No. 14

In the
Supreme Court of the United States

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Petitioner,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the statutes, regulations and HUD requirements were so pervasive that federal control over Indian housing construction created a trust responsibility towards Indians which the Complaint alleges was violated in this case. See *United States v. Mitchell*, 463 U.S. 206, 218-224 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 468-477 (2003).

PARTIES

The Petitioners are Martin Marceau; Candice Lamott; Julie Rattler; Joseph Rattler, Jr.; John G. Edwards; Mary J. Grant; Gray Grant; Deana Mountain Chief who are purchasers and residents of Indian Housing built and paid for by Defendants.

Respondents Blackfeet Housing Authority, and its board members; Sandra Calfbossribs; Neva Running Wolf; Kelly Edwards, Ursula Spotted Bear, Melvin Martinez, Secretary; Department of Housing and Urban Development, United States of America are responsible for the funding, construction and maintenance of the houses in question.

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1.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of certiorari to review the opinion of the Ninth Circuit Court of Appeals entered on August 22, 2008.

OPINION BELOW

The Ninth Circuit Court of Appeals filed its Order and Amended Opinion August 22, 2008, and selected this decision for publication. See 540 F.3d 916 (9th Cir.2008). It had previously filed an Order and Amended Opinion on March 19, 2008, published at 519 F.3d 838 (9th Cir. 2008) after rehearing before a three-judge panel on May 9, 2007. The initial Order and Opinion of July 21, 2006, published at 455 F.3d 974 (9th Cir. 2006) was replaced in part and adopted in part. The Amended Opinion of March 19, 2008 appearing at 519 F.3d 838 (9th Cir. 2008) was replaced in its entirety.

2.

JURISDICTION

The Ninth Circuit filed its decision on August 22, 2008, and entered an order denying Defendants'/Respondents' motions for rehearing and for rehearing en banc on August 22, 2008. This Court has jurisdiction under 28 U.S.C. §1254(1) to review the circuit court's decision on a writ of certiorari.

STATUTORY PROVISIONS INVOLVED

1. United States Housing Act of 1937 and 1949, 42 USC §1437-1437x.
2. The National Housing Act 12 U.S.C §§17151(a) and 1738(a).
3. The Indian Housing Act of 1988 42 U.S.C. §1437aa-ff.
4. The Native American Housing and Self-Determination Act of 1996 (NAHASDA) 25 U.S.C. §§1702-1750.

STATEMENT OF FACTS

Petitioners adopt the Ninth Circuit's Statement of Facts as follows:

"The Blackfeet Tribe is a federally recognized Indian tribe. In January 1977, the Tribe established a separate entity, the Blackfeet

("Housing Authority"). *See* C.F.R. §805.109(c) (1977) (requiring, as a prerequisite to receiving block grant from the United States Department of Housing and Urban Development ("HUD"), that a tribe form a HUD-approved tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance. Blackfeet Tribal Ordinance No. 7, art. II, §§1-2 (Jan. 4, 1977), *reprinted in* 24 C.F.R. §805, subpt. A, app. I (1977). Thereafter, HUD granted the Blackfeet Housing Authority authorization and funding to build 153 houses on the Blackfeet Reservation.

"Construction of those houses, and some additional ones, began after the Housing Authority came into being in 1977. Construction was completed by 1980. The houses-at least in retrospect-were not well constructed. They had wooden foundations, and the wood products used in the foundations were pressure-treated with toxic chemicals. The crux of Plaintiff's complaint is that HUD directed the use of pressure-treated wooden foundations, over the objection of tribal members, and that the Housing Authority acceded to that directive.

"In the ensuing years, the foundations became vulnerable to the accumulation of moisture, including both groundwater and septic flooding, and to structural instability. Some of the houses have become uninhabitable due to contamination from toxic mold and dried sewage residues.

The residents of the houses have experienced health problems, including frequent nosebleeds, hoarseness, headaches, malaise, asthma, kidney failure, and cancer.

"Plaintiffs bought or leased the houses, either directly or indirectly, from the Housing Authority. After it became clear that the houses were unsafe or uninhabitable, Plaintiffs asked the Housing Authority and HUD to repair the existing houses, provide them with new houses, or pay them enough money to repair the houses or acquire substitute housing. When they received no help from either entity, Plaintiffs filed this class action... ." 540 F.3d at 919-920, App. 7-8.

Judge Pregerson, in dissent, adds this significant additional fact:

> Plaintiffs allege, as the crux of their claim that HUD *required* the use of wood foundations over the objections of Tribal members, and that the Housing Authority acceded to that directive.

540 F.3d at 930, App. 27.

Judge Pregerson also outlines the home ownership program that is critical to an understanding of this case as follows:

"Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§1437-1440, HUD developed the Homeownership Program. HUD designed the Homeownership Program to meet the housing needs of low-income American Indian families. HUD entered into agreements called 'Annual Contributions Contracts' with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authority and pre-approved by HUD. *See* 24 C.F.R. §805.102 (1979); *id.* §805.206. After securing funding from HUD, a tribal housing authority would then contract with eligible American Indian families. *See id.* §805.406. The program required families to contribute land, labor, or materials to the building of their house, *see id.* §805.408, and after occupying the house, each family made monthly payments in an amount calibrated to their income, *see id.* §805.416(a)(1)(ii). The home-buyers were responsible for maintenance of the house. *See id.* §805.418(a).

"Until 1988, when the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996), HUD operated the Homeownership Program under a series of regulations and its "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988),

reprinted in 1988 U.S. C.C.A.N. 791, 793." 540 F.3d at 930, App. 26.

PROCEDURAL BACKGROUND

Plaintiffs filed a class action against the Housing Authority, the board members of the Housing Authority, HUD, and the Secretary of HUD. Plaintiffs seek declaratory and injunctive relief and damages for alleged violations of statutory, contractual and fiduciary duties.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim upon which relief can be granted. The Housing Authority and its board members filed a motion to dismiss because of tribal immunity. The district court granted those motions. 540 F.3d at 919-20, App. 8.

Plaintiffs appealed to the Ninth Circuit Court of Appeals. In its initial opinion Ninth Circuit affirmed the dismissal of HUD and its Secretary, but reversed with respect to the Housing Authority. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974 (9th Cir. 2006)(App.92-121). The Ninth Circuit then granted the Housing Authority's petition for rehearing and issued an amended opinion affirming its reversal with respect to the Housing Authority but further reversing the district court's dismissal of the Administrative Procedures Act count against HUD. *Marceau v. Blackfeet Hous. Auth.*

(Marceau II), 519 F.3d 838 (9th Cir. 2008)(App. 75-121). The Housing Authority and HUD filed separate petitions for panel rehearing and review en banc. The Ninth Circuit then issued its second amended opinion that is the subject of this petition. *Marceau v. Blackfeet Hous. Auth.* (Marceau III), 540 F.3rd 916 (9th Cir. 2008) (App. 1-45).

In Marceau III, The Ninth Circuit remanded the case against the Housing Authority to the district court with instructions to stay, rather than dismiss, the action against the Housing Authority while Plaintiffs exhaust their tribal court remedies. 540 F.3d at 921, App. 9-10.

Second, over a strong dissent of presiding Judge Pregerson, the Ninth Circuit refused to reverse the district court's dismissal of Plaintiffs' claim that the federal government breached its trust responsibility to Indians. The majority of the panel held that the laws, regulations and handbook requirements failed to establish that the federal government exercised direct control over Indian houses or money. 540 F.3rd 927-28, App. 21-22. By contrast, Judge Pregerson stated that HUD's control of housing on tribal land and the Homeownership Program was so pervasive that the Tribe and its members had little control over how HUD housing would be built and no power to control the materials used. The pervasive regulation of housing on the Blackfeet reservation was exactly like *Mitchell II* and *White Mountain Apache*. Thus, Judge Pregerson

would hold that the government breached its fiduciary duty by requiring the tribes to use substandard, hazardous building materials and refusing to repair or rebuild the homes. 540 F.3rd 940, App. 44-45.

As to the Administrative Procedure Act claim that HUD should be ordered to "fix it," the Ninth Circuit unanimously held that the claim was not barred even if it did require money to fix it because the request for an injunction was not a claim for money damages. See *Bowen v. Massachusetts,* 4897 U.S. 879, 895 (1988). Thus, this count was remanded to the district court to determine whether HUD failed to comply with its own regulations and whether arsenic-treated lumber was within industry standards at the time. 540 F.3rd 928-29, App. 23-25.

Finally, the Ninth Circuit reaffirmed its earlier determination that the district court lacked jurisdiction to hear the breach of contract claims against HUD. 540 F.3rd 929, App. 25.

This Petition addresses only the second issue, namely, whether the federal government violated its trust responsibility to Indians.

REASONS FOR GRANTING THE PETITION:

I.
There is a Conflict in the Circuits. This Case from the Ninth Circuit Is

Diametrically Opposed to a Decision of the Federal Circuit in *Navajo Nation v. United States*, 501 F.3d 1327.

The majority opinion from the Ninth Circuit panel below rejected the notion of federal trust responsibility upon the grounds and for the reasons that the statute and regulations regarding Indian housing were not, in and of themselves, sufficient to show the necessary control for Indian trust responsibility under *United States v. Mitchell*, 463 U.S. 206, 224-26 (1983) ("*Mitchell II*") and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474-76 (2003) ("*White Mountain Apache*").

The majority stated, over a strong dissent from presiding Judge Pregerson, that the test for federal trust responsibility for Indians cannot depend upon what people do in implementing or administering the statutes and regulations. Whether or not the statutes and regulations are administered by people acting arbitrary, capriciously, or unwisely does not matter. The statutes and regulations themselves must be so pervasive that there is federal control or supervision to meet the test.

> Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not

> approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the supreme court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

540 F.3d at 927-28, App. 21-22.

By contrast, the Federal Circuit has held exactly the opposite. *Navajo Nation v. United States*, 501 F.3d 1327, 1335-36 (2007) (Rehearing and Rehearing En Banc denied 2008), cert. granted October 1, 2008, 129 S. Ct. 30, 76 U.S. L. W. 3621. In that case, the statute and imple-menting regulations at the time the case arose did not contain the necessary language. Yet the Federal Circuit Panel had no difficulty finding that "the government exerted actual and significant control" over the coal leasing and royalty rate in question.

> While it is true that the regulation was adopted "after the events at issue" *Navajo III*, 537 U.S. at 508, N. 12, 123 S. Ct.

> 1079, the government does not dispute that the asserted sections of 30 C.F.R. Part 206 subpart F describe actual practices that existed at the time of the lease amendments and that such practices are within the Department of the Interior's authority. Where the government exercises actual control within its authority, neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise.

501 F.3d at 1342.

The Federal Circuit then quotes from *Mitchell II*:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise). *Id*; *Mitchell II*, 463 U.S. at 225.

In the instant case the majority of the Ninth Circuit Panel refuses to apply the Indian trust responsibility notwithstanding the overwhelming

factual support for the pervasive control and supervision exercised by the federal government. By contrast, the Federal Circuit, on very similar facts and circumstances, does apply the Indian trust responsibility to the *Navajo Nation* case. Judge Pregerson acknowledges that on their face, the statutes in the instant case only establish a mechanism for lending money to tribal housing authorities. However, when the entire statutory framework including the regulations and the Handbook rules are considered, along with the actual implementation by the regulators are added to the equation, the following conclusion results: "Federal control over the funds and the program is pervasive." 540 F.3d at 940, App. 44 (Pregerson dissenting). Judge Pregerson is exactly correct and is exactly en sync with the Federal Circuit decision in *Navajo Nation*, *supra*.

This Court granted *certiorari* in the *Navajo Nation* case on October 1, 2008. *United States v. Navajo Nation*, i29 S. Ct. 30, 76 U.S. L. W. 3621 (No. 07-1410). The clarification provided by this Court in that case should also apply to the instant case. The Petition for *certiorari* should be granted in this case so the cases can be handled together. See also, *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996).

II.

The Majority of the Ninth Circuit Panel Misconstrues and Misunderstands This Court's Test for Federal Trust Responsibility to Indians as Expressed in *Mitchell II* and *White Mountain Apache*.

This Court has established a special remedy for breach of the federal trust responsibility owed by the government to Indians. It is outlined in *Mitchell II*," 463 U.S. at 224-26, and *White Mountain Apache*, 537 U.S. at 474-76. As summarized in *White Mountain Apache*, *Mitchell II* found a pervasive role in the government's sale of timber from Indian lands sufficient to trigger the trust responsibility.

> The subsequent case of *Mitchell II* arose on a claim that did look beyond the Allotment Act, and we found that statutes and regulations specifically addressing the management of timber on allotted lands raised the fair implication that the substantive obligations imposed on the United States by these statutes and regulations were enforceable by damages.

White Mountain Apache, 537 U.S. at 473-74.

The issue is whether or not the government has a "pervasive" role which defines the contours of the United States' fiduciary responsibilities beyond the bare or minimum level.

> The Department of the Interior possessed "comprehensive control over the harvesting of Indian timber" and "exercise[d] literally daily supervision over [its] harvesting and management" *Mitchell II supra,* at 209, 222, 103 S. Ct. 296 (quoting *White Mountain Apache Tribe v. Bracker*, 448 US 136, 145, 147, 100 S. Ct. 2578, 65 L.Ed.2nd 665 (1980))(internal quotation marks omitted), giving it a "pervasive" role in the sale of timber from Indian lands under regulations addressing "virtually every aspect of forest management," *Mitchell II supra*, at 219, 220, 103 S. Ct. 2961. As the statutes and regulations gave the United States "full responsibility to manage Indian resources and land for the benefit of the Indians" we held that they "define[d]....contours of the United States' fiduciary responsibilities" beyond the "bare" or minimal level, and thus could "fairly be interpreted as mandating compensation" through money damages if the government faltered in its responsibility. 463 US, at 224-226, 103 S. Ct. 2961.

White Mountain Apache, 573 U.S. at 474.

White Mountain Apache then added the further clarification that the United States' fiduciary responsibilities included a situation in which the United States occupied the property in question. When it does so, there is a fair inference that an obligation exists to preserve the property improvements and the United States may not allow it to fall into ruin on its watch. 537 U.S. at 475.

The two Judges of the Ninth Circuit writing the majority opinion below totally misconstrue this language and these holdings to require that the statutes and regulations in and of themselves to create the pervasive role that constitutes the bare or minimum level of federal involvement. They failed to consider how these statutes and regulations *are administered.* They failed to take into consideration the manner in which the statutes and regulations are carried out.

Any law or rule can be either passive and not oppressive or overwhelming and totally pervasive depending on how it is administered. The majority opinion below takes the erroneous position that the statutes and regulations themselves must be pervasive. The majority opinion below takes the erroneous position that whether or not the people who administer them have acted arbitrarily or capriciously under these statutes and regulations is irrelevant

and immaterial. As they so erroneously stated:

> Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the supreme court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

540 F.3d at 927-28, App. 21-22.

First, such a proposition is wrong ethically, morally, logically and legally. To separate the administration of a statute or regulation from the text and to suggest that a poor, unwise, and over-zealous interpretation of the statute does not count in determining the existence of a fiduciary duty is

ethically and morally unacceptable. To the Indian victims, who have suffered wrongs at the hands of the United States for many years, it is the same, whether the regulations required the wrong or the persons administering the regulations caused the wrong. Further, it is illogical. We cannot hide our heads in the sand. The result is the same whether an acceptable regulation is administered by an over-zealous administrator or an unacceptable regulation is administered by a prudent regulator. The bottom line is pervasive control. The bottom line is the same control over "virtually every aspect of" housing that exceeds the bare or minimum level of control.

Finally, the proposition is wrong legally. The elaborate control over forest and property belonging to Indians found in *Mitchell II* did not make any such distinction. Control is control whether a corrupt administrator is involved or not. See *Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) *cert.* granted, October 1, 2008, 129 Sup. Ct. 30, 76 U.S. L. W. 3621; *Brown v. United States*, 86 F.3d 1554, 1560 (Fed. Cir. 1996).

For the United States government to absolve itself of responsibility by suggesting that the laws and rules were okay but it's just those administrators who caused your losses and your suffering is wrong. It is contrary to the best notions of fairness and justice that brought about the federal trust responsibility in the first place. This issue begs for further consideration by this Court.

Second, this proposition is inconsistent with fundamental trust law. It is, after all, trust law to which we must look. *Mitchell II* refers to the necessary elements of a common law trust. 463 U.S. at 225. "Elementary trust law" is what we must look to in the final analysis. *White Mountain Apache*, 537 U.S. at 475.

The whole concept of trust arose as an equitable remedy in courts of equity. The English Court of Chancery developed this notion. The Courts of Chancery administered the rules and applied principles of equity. While the there is no longer a division between courts of law and courts of equity, the trustee's obligation is still an equitable one.

> "The trustee's obligation is said to be equitable." Originally it was recognized only by the English Court of Chancery, which alone administered the rules and applied the principles of equity. ... [T]he trustee's obligation [is] equitable.

Bogert, Law of Trusts 5, §1 (1973). Accord Restatement 3d Trusts 1, (Introductory Note.)

The requirement to do equity is not uncommon as it relates to trusts. See *Matter of Kuehn,* 308 N.W.2d 398, 399 (S.D. 1981); *Kurowski v. Burch*, 290 N.E.2d 401, 406 (Ill. App. Ct. 1972); see generally Restatement (First) of Trusts §240. Indeed, even the Ninth Circuit has recognized the importance of

equitable remedies in applying traditional trust remedies. *Standard Insurance Company v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997); *Donovan v. Mazzola*, 716 F.2d, 1226, 1239 (9th Cir. 1983) cert. den. 1984, 104 S. Ct. 704.

It is certainly not equitable to the beneficiary to deny relief because the trustee's agents (government agents) have not acted wisely or acted arbitrarily and capriciously. The impact to the beneficiary (the Plaintiff Indians) is the same whether the action was directed by an abusive regulation or the action was directed by an agent abusing his authority under a valid regulation. It is totally inequitable to deny relief because of such a distinction. For the Majority of the Ninth Circuit Panel to hang their hat on this distinction is contrary to trust law principles.

Finally, cases out of the Federal Circuit indicate the Ninth Circuit is just plain wrong. Thus, in *Brown v. United States*, 86 F.3d 1554, 1560-61 (Fed. Cir. 1996), the question was whether the Indian Long Term Leasing Act and action taken under it placed a fiduciary responsibility in the government sufficient to grant jurisdiction for recovery of damages for proof of breach of a specific duty imposed by the regulations. The Federal Circuit cites *Mitchell II* as setting forth the proper test:

> [W]here the Federal Government takes on or has *control or supervision over tribal monies or properties* the federal relation-

> ship normally exists with respect to such monies or properties.

Mitchell II, 463 U.S. at 225, quoted with approval in *Brown*, 86 F.3d at 1560. The Court in *Brown* then concluded the above statement was in the disjunctive - either control or supervision and not both - is required. Furthermore, there are no limiting or clarifying adjectives on either the word "control" or the word "supervision." From this the Federal Circuit concluded.

> The proper test of whether the government has assumed fiduciary duties in the commercial leasing of allotted lands is thus whether, under §415(a) and/or part 162, the Secretary, rather than the allottees, has control or supervision over the leasing programs. All that remains, at this stage of the case, is to apply the test to the statute and regulations at issue.

86 F.3d at 1561.

Clearly there is no room for differentiating whether the control is strictly or solely from the regulations or whether the control is a combination of the regulatory mandate plus the way it is admin-

istered. Accord, *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983) *cert.* denied, 467 U.S. 1256 (1984); *Pawnee v. United States*, 830 F.2d 187 (Fed. Cir. 1987). Similarly, in *Navajo Nation v. United States*, 501 F.3d, 1327, 1343 (Fed. Cir. 2007) Rehearing and Rehearing En Banc denied 2008, *cert.* granted October 1, 2008, 129 Sup. Ct. 30, 76 U.S. L. W. 3621, the Court states that "neither Congress nor the Agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise." 501 F.3d at 1343. Without stating whether or not the control comes from the regulations or the individual who administer the regulations, the Federal Circuit makes it clear the attachment of a fiduciary trust relationship depends upon the final results. Citing *Mitchell II* the Court states:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties the fiduciary relationship normally exists . . .

Id.

Indeed the Ninth Circuit majority opinion strays from this test set forth by this Court in *Mitchell II*. It is followed in the Federal Circuit. This Court needs to clarify the ruling and make it clear that federal control or supervision is the key and it doesn't matter how that control or supervision is supported or justified.

III.

A Combination of the Federal Government's Commitment to Indians in Housing, the Congressional Acts on Housing, and the Severe Disadvantage the Indian Allotment Act Causes Indians Seeking to Own Their Own Home Places an Enormous Burden on the United States. This Burden Further Supports the Application of Federal Trust Responsibility to the Facts of this Case.

A. History of the Obligation of the United States for Indian Housing.

The United States made its first pledges to provide housing assistance to Indian people in the Removal Treaties of the 1820's and 1830's. In those Treaties, it agreed to compensate tribes and help them establish new homes to replace the ones they left behind. (F. Cohen, Handbook of FederalIndian Law, 1387, §22.05(1) (2005 ed.)("Cohen") Promises continued in the Treaties of the 1850's and 1860's particularly when it started focusing on the assimilation desires to encourage Indians to live in permanent houses and engage in agriculture and to inculcate an "American idea" of private property. *Id.* at 1387-88. See also, *Virginia Davis*, a Discovery of Sorts: Reexamining the Origins of the Federal Indian

Housing Obligation, 18 Harvard Blackletter L. J. 211, 221-225, (2002).1

In 1928, serious deficiencies in the attempt to provide Indian Housing and its serious affect on the health and well-being of Indian peoples was revealed in the Meriam Report. The Report showed that most Indian homes were more crowded and in poorer condition than homes in either urban tenements or rural communities in this country.

Worse, houses built by the Federal Government often only exasperated the problems since they had less ventilation than traditional homes and were less well-suited to Indian needs. *Inst. for Gov't Research*, the Problem of Indian Administration 553-561 (1928) (Lewis Meriam, Technical Director) (Johnson Reprint Corp. 1971); Cohen at 1387-88. Some efforts were made to address the problem in the 1934 Indian Reorganization Act (25 U.S.C §461 et seq. 48 stat. 984,

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[1] There does not appear to be a direct reference to housing in the treaties with the Blackfeet Indians. See the treaty with Blackfeet, October 17, 1885 (11 Stat. 657), which provides for an annual sum of money to be expended for useful goods and provision and other articles as the President may determine (Article IX) and another sum of money annually for instructing Indians in agriculture and mechanical pursuits and other educational endeavors (Article X). Article X specifically requires that the annual fund be used "in any other respect promoting their civilization." The Court of Claims has held that treaty language such as the requisites to "promote civilization" includes a covenant to provide housing. *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446-67 (1992). See Pregerson in *Marceau I*, specially concurring, App. 119.

Chap. 576) which established a revolving loan fund that tribes could use to build housing and improve Indian land. Cohen at 1388. A short-lived Indian Relief and Rehabilitation Program was created under the Emergency Relief Appropriations Act (48 Stat. On 15, Chap. 48) to provide housing in Indian country in 1936. Cohen at 1388. No real assistance, however, was provided to Indians until 1961 after a devastating report on the state of Indian Housing by a Task Force on Indian Affairs to the Secretary of the Interior (July 10, 1961). As a result, the Public Housing Administration initiated programs to permit Indian Housing Authorities to participate under the United States Housing Act of 1937. The United States Housing Act of 1937 was enacted to help all Americans find decent, safe and sanity living conditions. PL 75-412, 50 Stat. 888 (1937), current version at 42 U.S.C. §1437-1444. In order to benefit, a local housing authority had to be created and it was generally considered that tribes had no authority to do so. See, Staff of Senate Committee on Interior and Insular Affairs, 94th Cong. First Sess., Staff Report on Indian Housing Effort in the United States with Selected Appendences 3 (Comm. Print 1975); see also Mark K. Almer, the Legal Origin of Indian Housing Authorities and the HUD Indian Housing Programs, 13 Am. Indian L. Rev. 109-110-11 (1988).

As Cohen states there then developed a proliferation of programs providing housing assistance to Indian people and tribes culminating with the 1988 Indian Housing Act which created a separate office of

Native American programs within the Department of Housing and Urban Development. Cohen at 1388-89. Even this effort, however, was not effective and its success was admittedly "limited." Remarks of Congressman Lazio, 142 Congressional Record H. 11603, 11613 (Daily edition, September 28, 1996). See also, an Excellent History of Congress' efforts to assist Indian housing in *Dewakuku v. Cuomo*, 107 F. Supp. 2d 1117, 1121-24 (2000) (*"Dewakuku I"*). The final case in this series is *Dewakuku III*, 226 F. Supp. 2d 1199 (D. Ariz. 2002).

The Mutual Help and Homeownership Program ("MHHO Program") was developed to assist low income Indian families in purchasing their own homes administered through regulations promulgated by HUD and the "Indian Housing Handbook". However, because Indian lands are held in trust by the government and alternative financing is not available, a total funding was required through HUD. See a description of this program in *Dewakuku I* at 1122. Even this program proved ineffective to remedy the Indian housing crisis. As the District Court states in *Dewakuku I*:

> The housing needs of Native Americans in Indian country were radically different from the needs of low income Americans in urban areas.

Id.

In 1987, according to a congressional report, 23.3% of the Native Americans, as compared to 6.4% of the total American population, continued to live in substandard housing. "H. R. Rep. #100-604 (1988), reprinted in 1988 U.S.C.C.A.M. 791, 795. On some reservations, the percentage rose as high as 75%. Remarks of Senator Cranston, 135 Congressional Record, S7608 (Daily Ed. June 10, 1988).

Then in 1996, Congress consolidated many of the HUD's programs under the Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 110 Stat. 4018 (1996), 25 U.S.C. §4101 et seq. The Bureau of Indian Affairs developed its own housing improvement program under the authority of the Snyder Act, 42 U.S.C. §5302 (17); 24 C.F.R. §1003.5. Cohen at 1397-98, §2205[3][a]. In addition, the Department of Agriculture's Rural Housing Service Program was designed to meet the needs of Indian communities. 42 U.S.C. §1471-1490s; Cohen at 1398-99, §22.05[4]. Finally, the Department of Veterans Affairs also designed a program that allows a portion of their Housing Loan Guarantee Program to benefit Indians. 38 U.S.C. §3761-3764. However, because of the enormous difficulty of operating the program on trust lands where the Indian does not own fee title to the land, it has met with limited success. Cohen at 1399, §22.05[5].

Notwithstanding all of these efforts on the part of Congress and the federal government to assist in Indian housing, housing in Indian country remains far

below the national standard. According to the U. S. Commission on Civil Rights, 40% of on reservation housing was inadequate, a figure six times the national average in 2003. Over 30% of reservation households were crowded, 18% severely so and all of this leads to ill-health and family abuse. Twenty percent of the reser-vation homes lacked complete plumbing. Less than half were connected to a public sewer system and 32% lacked telephone service.

As a rule, only about half as many Indian people as other Americans own their own homes. U.S. Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 51, 53, 63 (2003); Cohen at 1389. Clearly one of the most telling reasons for this difficulty and poor result is the General Allotment Act of 1887 ("Dawes Act") 24 Stat. 388, 25 U.S.C. §331 et seq. which specifically provides that beneficial title for lands allotted to tribes and to individual Indians is vested in the United States as trustee for the Indian beneficiaries. See, presiding Judge Pregerson, dissenting in opinion below, App. 29, 37. As Cohen states:

> Difficulties foreclosing on real property on trust land discourage conventional lenders from making home finance loans on reservations.

Cohen at 1389. See also U.S. General Accounting Office, Native American Housing; Home Ownership

Opportunities on Trust Lands are limited, GAO-RCED-98-49, at 6-7 (1998).

Obviously, when the entire basis for safe, sanity and decent housing in the United States is based on homeownership with federally guaranteed loans, this system doesn't work in Indian country where the individual Indians do not own their own land and cannot own their own land because of the Indian Allotment Act of 1887.

Cohen cites another factor contributing in the inadequacy of Indian housing.

> Federal housing often failed to comply with basic minimum standards, and might be uninhabitable almost as soon as it was built.

Cohen at 1389, 90 §2205[1]. This is exactly what is involved in the instant case.

Cohen also cites lack of basic infrastructure such as roads, sewage, water and electrical systems and the failure to take into account the cultural standards of the various Indian tribes. He concludes by stating "these problems are exasperated by persistent under-funding of Indian housing program." *Id.*

B. Facts of this Case.

The District Court granted Defendants' Motion to Dismiss for lack of jurisdiction under Rule 12(b). When a 12(b) Motion to Dismiss is made, whether for lack of jurisdiction or failure to state a claim for relief, the Court must take as true, all well-pled facts alleged in the Complaint and construe the Complaint liberally in favor of the Plaintiff. *Dudnikov v. Chalk and Vermilion Fine Hearts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008); *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006). This point is acknowledged in the 9th Circuit Opinion below. App. 21.

The Amended Complaint in the instant case alleges, in part, as follows:

> 17. The construction of these houses was under the close supervision, mandate and direction of HUD. In this regard, the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish the goals and purposes of HUD.
>
> 18. In order to save money or for other reasons unknown to representative plaintiffs and class members, HUD directed that all 153 homes in the first phase of construction be constructed urging chemically-treated wooden foundations even though such foundations were not standard

in the industry at the time, were in violation of state and local building codes, are now in violation of their own regulations, and even though HUD knew, or should have known, that such construction materials could eventually produce contamination and could eventually lead to uninhabitability of these 153 homes.

19. The Defendant Blackfeet Housing acknowledged the mandates and directions of HUD and submitted thereto and proceed to construct the houses using chemically-treated wooden foundations and other defective products and designs, even though they also knew such foundations were substandard in violation of state and local building codes and would eventually produce contamination that could lead to uninhabitability.

20. Because of the use of wooden foundations and because of other design and construction defects, the houses were unable to provide continuous moisture control. This failure caused wide-spread mold

development and septic contamination.

21. The latent defects of the chemically treated wooden foundation and other defective designs have become known to representative plaintiffs and other class members recently. In particular, pathogenic mold, septic-sewage contamination and other toxic and dangerous substances have developed. These molds, septic-sewage contamination and other toxic substances have caused various health and medical conditions and have exasperated other health and medical condition in representative plaintiffs and other class members including their spouses and children and other dependents living in their homes.

22. In addition, many of the houses contained extensive septic - sewage contamination resulting from repeated ground water and septic flooding. Children who have been required to sleep in rooms with mold and septic-sewage contamination have developed health complications that have prevented them from playing sports and that

> resulted in frequent nose bleeding, asthma, hoarseness, headaches and malaise, kidney failure, and cancer. Elderly and other class members have developed similar health complications from exposure to these contaminations.
>
> 23. Because of the pathogenic mold, septic-sewage contamination and other toxic substances, the houses have become unsafe for human habitation and representative plaintiffs and other class members have been damaged.

Amended Complaint, App. 137-138.

Presiding Judge Pregerson, in *Marceau I*, states: "for a more vivid description of Plaintiffs' plight, see *Jessie McQuillan Rotten Deal, Missoula Indep.*, April 6, 2006, available at: http://www.Missoulanews.com/news/newsasp?no=5625 ." App. 97, note. 1.

Clearly, this is another confirmation of what Cohen refers to as failing to comply with basic minimum standards making the houses uninhabitable.

C. The Congressional Mandate to Provide Safe, Sanity and Decent Housing to All Americans.

Starting with the United States Housing Act of 1937, it is clear that Congress gave the Administration the mandate to provide safe, sanitary and descent housing for every American family, including Indians. The purpose was clearly stated in the Declaration of policy:

> It is the policy of the United States . . . to promote the general welfare of the nation by imploying the funds and credit of the Nation, as provided in this act (A) to assist states and political subdivision of states to remedy the unsafe housing condition and the acute shortage of decent and safe dwellings for low-income families . . . .

42 U.S.C. §1437(a). See also, 42 U.S.C. §1437(a)(4)(the goal of providing decent and affordable housing), and the nondiscrimination clause in 42 U.S.C. §1437(b)(3).

At least one District Court has stated that this direction is a mandate and not a precatory desire. *Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (C.A.D.C. 1974).

A separate program called Mutual Help Ownership Opportunity Program was developed under the Housing Act of 1937, which was intended to assist the Indians to obtain homeownership. As previously indicated, however, this did not work very well because Indian Lands are held in Trust by the government and alternative financing is just not

available. *Duwakuku I* at 1122. The home ownership program was then codified in the Indian Housing Act of 1988 which, for the first time established a separate office of Native American programs within the Department of Housing and Urban Development. 102 Stat. 676 (1988); 42 U.S.C. §§1437aa-ff.

Indian Housing Act of 1988 was not very successful and was, in turn, repealed in 1996 by the Native American Housing Assistance and Self-Determination Act of 1996, Pl. 104-330, 110 Stat. 4016 (1996), 25 U.S.C. §4101 et seq. ("NAHSDA"). The regulations are found at 24 C.F.R. §2000.200 et seq. The primary objective of NAHASDA is "to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian reservations and in other Indian areas for occupancy by low income Indian families. . . ." 25 U.S.C. §4131(a)(1).

Among other things, under this Act, HUD has the duty to repair the houses that are under its supervision. 25 C.F.R. §905.270. See *Dewakuku III* at 1203-04. In NAHASDA, Congress reinforced its trust obligation to Indian people stating that Congress, through treaties, statutes and historical relations " . . . has a unique trust responsibility to protect and support Indian tribes and Indian people." That trust is discharged, in part, by "providing affordable homes in safe and healthy environments." 25 U.S.C. §4101. As it relates to this case, it is significant that the houses were constructed in 1979

before both the Indian Housing Act of 1988 or NAHASDA were adopted. Nevertheless, the reference in NAHASDA to the trust responsibility is an acknowledgement of the existence of a previously existing trust responsibility with regard to Indian Housing. See 25 U.S.C. §4101.

D. The Control Exercised by HUD on Indian Housing is Plenary.

The Amended Complaint alleges that the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish HUD's goals and purposes. App. at 51-52. Further, the Amended Complaint alleges that Blackfeet Housing submitted to the mandates and directions of HUD, including the use of wooden foundations even though they knew such foundations were substandard, in violation of state and local building codes and even though they knew such foundations would eventually produce contamination that could lead to uninhabitability. *Id.* These allegations are not made in a vacuum. In addition to Cohen's comment that federal housing "often failed to comply with basis minimum standards, and might be uninhabitable almost as soon as it was built" (Cohen at 1389-90) the same thing is also found in the case law. Thus, in *Dewakuku I*, the District Court in Arizona stated:

> Although technically an exercise of tribal sovereignty, the Indian Housing Authority is, in reality, a creature of HUD. HUD's

> regulations "permit" a tribal government to create an Indian Housing Authority. See 24 C.F.R. §§905.108(a), 905.109 (1990). In every instance where a tribal government creates a housing authority, it must follow the exact format prescribed by HUD. See 24 C.F.R. §1905.109. Furthermore, HUD will not enter into a contract with an Indian Housing Authority unless the tribal ordinance creating the Housing Authority is submitted to and approved by it. See *id.* Moreover, the ordinance must be submitted with evidence that the tribal government's enactment was either approved by the Secretary of the Interior or that the Secretary of the Interior has reviewed the ordinance and does not object to it. See *id.* The model tribal ordinance, first conceived by HUD in 1962, sets out the functions of the Indian Housing Authority and lifts its primary purpose as the eradication of unsafe and unsanitary housing conditions on the reservation.

Dewakuku I, 107 F. Supp. 2d at 1121-22.

The same thing is also related in *Dewakuku III*. The *Dewakuku* case is quite similar to the instant case. Dewakuku purchased a home through the Mutual Help Program authorized by the Indian Housing Act. She alleges the home was in such poor condition and so poorly constructed that it had a

malfunctioning electrical system, cracking walls and floors, leaky roof, popping nails, and is both unsafe and overly expensive to heat in the winter. *Dewakuku III*, 226 F. Supp. 2nd at 1201. After several wins at the District Court and one set back in the D.C. Circuit, the case disappears indicating that the matter was obviously settled or otherwise a satisfactory resolution was obtained. In *Dewakuku III*, the Federal District Court specifically held that HUD violated the Administrative Procedures Act by failing to supervise the Hopi Housing Authority and provide the tribal member with a decent, safe and sanitary home. *Id.* at 1206. The Secretary was ordered to cure the defects in the design and construction of Dewakuku's home. *Id.* In reaching that conclusion, the Federal District Court stated that:

> [T]he duty to build standard housing was absolute under the Indian Housing Act. It was only the *method* of doing so that was committed to agency discretion. All parties concede that this duty was not met in the case of Dewakuku's home.

Id. at 1202.

In that case, as in the instant case, HUD insisted that the responsibility for Dewakuku's home ultimately rested with the local Housing Authority. The Court answered that contention as follows:

While at first glance this argument makes sense, a more probing analysis leads the court to reject it. HUD's supervisory powers over tribal authorities when implementing the mutual help program are substantial; indeed, they can be properly termed as near total control. Nothing could have been done on this project without HUD's explicit approval.

Tribal housing authorities have never been seen as wholly independent entities under the Mutual Help Program in the realm of home construction. To insure that the proposed low income housing met applicable standards, Congress, when it passed the Indian Housing Act, anticipated that HUD would provide the requisite technical and supervisory assistance. . . . More concretely, any analysis of the Indian Housing Acts implementing regulations makes clear that HUD maintains oversight over virtually everything the Hopi Housing Authority did regarding the construction of housing under the mutual help program-from cite selection 24 C.F.R. §905.230 (1991) and production method 24 C.F.R. §905.215(a) (1991), to the design 24 C.F.R. §905.250 (1991) and development budget 24 C.F.R. §995.255(a)(2)(1991)....

> In some, assuming the Hopi Housing Authority's plan met all applicable standards, construction on a home like Dewakuku's could never have begun without HUD's prior approval. These standards included the use of "structurally sound" building materials and "cost-effective energy" 42 U.S.C. §1437bb(c)(B) .... HUD's oversight capacities did not stop there. HUD had a substantial role in overseeing post construction inspection and certification.

226 F. Supp. 2d 1202-03.

Further, the Court stated:

> The Hopi Housing Authority is not, in any sense, it own agency or a nonprofit organization with access to contributions, nor is it a private, for profit corporation with capital sufficient to cure the defects in Dewakuku's home. It was created solely to administer the public housing monies received from HUD for Hopi lands. It is an offshoot of HUD - HUD's administrator of public housing construction on Hopi reservations and nothing more.

Id. at 1204. The Court concluded that by asking Dewakuku to sue the Housing Authority, HUD is essentially asking Dewakuku to sue an empty shell in order to avoid direct liability itself. *Id.*

This is precisely the Plaintiffs' contention in the instant case. Suit against the Blackfeet Housing Authority is an empty remedy. HUD made all the decisions. HUD required substandard construction by insisting on wooden foundations where wooden foundations were simply inappropriate. HUD should not be allowed to avoid its responsibility. To do so is one more strike in the breach of responsibilities of the United States to its Indian citizens.

E. Because Indian Land is Held in Trust, Indian People Are at a Great Disadvantage in Housing.

Presiding Judge Pregerson put his finger directly on the main problem of this case. Indian housing is substandard because of Congress. It is Congress's decision to hold tribal land in trust thereby making it practically impossible to obtain home financing like all other citizens.

As Judge Pregerson so eloquently stated:

> Congress's decision to hold tribal land in trust has the practical result of eliminating the private housing market on tribal land because neither individual

> members of the tribe nor the tribe itself has an ownership interest that can be used as security. The government's decision to hold tribal land in trust shows Congress' intent to maintain pervasive control over the resource at stake and gives rise to a fiduciary duty in the government-created tribal housing market.

540 F.3d at 936, App. 37.

Judge Pregerson then refers to the adverse consequences of the government decision to take tribal land in trust.

> [B]y holding tribal land in trust and preventing alienation, the federal government foreclosed many options that exist in most private housing markets.

Id. Tribal land simply cannot be used as collateral.

Not only does this single factor contribute more than anything to the pervasive control that the government exercises over Indian housing but Judge Pregerson makes a persuasive point that the regulations and statutory scheme itself is also pervasive.

> On their face, these statutes only establish a mechanism for lending

> money to tribal housing authorities. However, a review of the statutory framework and the homeownership program reveals a much more pervasive and controlling framework, as detailed above. The homeownership program details the requirements for the housing and connected contracts. There is no language indicating that the goal of the homeownership program is merely to help Indian tribes in managing their land and resources. The regulations do not defer to tribal authorities or tribal decision making, but instead explicitly detail what the tribal authorities are to do each step of the way. **Federal control over the funds and the program is pervasive.**

540 F3d at 940, App. 44. (Emphasis supplied.)

It is respectfully submitted the majority opinion on this point is very weak. Indeed, it is illogical to think that in a trust situation one can only consider the cold statutes and regulations without looking at how they are implemented in fact. Judge Pregerson, on the other hand, is exactly right and has precedent to support him.

The Indian Housing Authorities are nothing but a straw person established by the United States Department of Housing and Urban Development

The statutes and regulation, particularly when considered with the Indian Housing Handbook, and when considered as actually implemented in the instant case leaves no question but that the federal control and supervision over Indian housing is pervasive. It is respectfully submitted the federal control over Indian housing is even more pervasive than the federal control over Indian timber lands in *Mitchell II*. The case begs for further consideration by this Court.

DATED this 17th day of November, 2008.

Respectfully submitted,

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No.

In the

Supreme Court of the United States

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Petitioner,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX

APPENDIX CONTINUED

APPENDIX CONTINUED

App. 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Defendants-Appellees.

No. 04-35210

D.C. No. CV-02-00073-SEH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted on Rehearing
May 9, 2007—Portland, Oregon

Filed August 22, 2008

Before: Harry Pregerson, Susan P. Graber, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Graber;
Dissent by Judge Pregerson

App. 2

SUMMARY

Government Law/Native Americans

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that the United States Department of Housing and Urban Development (HUD) did not undertake a trust responsibility toward tribe members to construct houses or to maintain or repair houses built under the auspices of HUD.

Appellants, members of the Blackfeet Indian tribe who purchased or leased substandard and possibly hazardous homes built under the auspices of HUD, filed a class action complaint in district court in Montana against appellees including HUD and the Blackfeet Tribal Housing Authority, seeking declaratory and injunctive relief and damages for alleged violations of statutory, contractual, and fiduciary duties. The homeowners made claims against HUD based on violations of the trust responsibility, the Administrative Procedure Act (APA), and breach of contract. The houses were built with wood foundations, using wood pressure-treated with toxic chemicals. The homeowners alleged that this caused their houses to deteriorate, and caused health problems for those who lived in the houses. HUD moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The tribal housing authority moved to dismiss based on tribal immunity. The district court granted both parties' motions to dismiss.

The homeowners appealed.

[1] Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is colorable, provided that there is no evidence of bad faith or harassment. [2] Tribal court jurisdiction over the contract disputes in this case was unquestionably colorable: the

homeowners were tribal members, the Blackfeet Housing Authority was a tribal entity, and at least some key events, such as construction of the homes, occurred on tribal lands. Because there is no evidence of bad faith or harassment, it had to be held that the homeowners had to exhaust their tribal court remedies. As a result, the case had to be remanded on this issue. [3] The court of appeals vacated its prior holding that the homeowners did not have to exhaust their tribal court remedies and that the Blackfeet Tribe had waived tribal immunity through the enabling ordinance that established the housing authority.

[4] In general, a trust relationship exists between the United States and Indian Nations. But that relationship does not always translate into a cause of action. [5] To create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue. [6] A court's analysis of a statute must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.

[7] HUD provided federal funds to the Blackfeet Housing Authority pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 (1976). [8] The express intent of Congress was that HUD *not* assume more responsibility in developing and managing housing projects than was necessary. HUD had legal obligations, however, those obligations apply to all HUD housing, and not just to housing constructed by Indian housing authorities. [9] HUD regulations required that low-income housing meet minimum property standards, but the regulations did not *require* the use of pressure-treated wooden foundations. [10] Further, Indian housing authorities were not rigidly bound by either the minimum property standards or prototype cost limitations. [11] The federal government held no property in trust; it did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms; and it did not build, manage, or maintain any of the housing. It had to be concluded that the district court prop-

erly dismissed the homeowners' claim that HUD violated a trust responsibility.

[12] The primary relief sought by the homeowners was an injunction ordering HUD to repair (or, where necessary, rebuild) their homes. The district court erred in dismissing the homeowners' APA claim before allowing adequate development of the record. **[13]** The record was silent about whether HUD failed to comply with its own regulations and whether arsenic-treated lumber was within industry standards at the time. The dismissal of the homeowners' APA claim had to be reversed and the case had to be remanded to the district court for further factual development.

[14] Under the APA, 5 U.S.C. § 702, a plaintiff must seek relief other than money damages. **[15]** The correct inquiry is whether the plaintiff seeks compensatory relief or instead seeks specific relief; the former constitutes money damages but the latter does not. **[16]** The homeowners sought an injunction, not to compensate, but to give them the very thing to which they were entitled. It had to be concluded that this relief was not money damages under § 706. Consequently, the homeowners' APA claim seeking injunctive relief was not barred.

[17] The district court lacked jurisdiction to hear the homeowners' breach of contract claims against HUD.

Judge Pregerson concurred in the majority's rulings on exhaustion of tribal remedies and the APA, but dissented with regard to its analysis of federal trust responsibility, writing that the federal government breached it fiduciary duty by requiring the tribes to use substandard, hazardous building materials during the construction of the homes and then refusing to repair or rebuild the homes.

COUNSEL

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Stephen A. Doherty and Patrick L. Smith, Smith, Doherty & Belcourt, P.C., Great Falls, Montana; Timothy J. Cavan, Assistant U.S. Attorney, Billings, Montana, for the defendants-appellees.

John T. Harrison, Confederated Salish and Kootenai Tribes, Tribal Legal Department, Pablo, Montana; Patterson V. Joe, Patterson V. Joe, P.C., Flagstaff, Arizona, for the amici.

ORDER

The opinion filed on July 21, 2006, slip op. 8071, and appearing at 455 F.3d 974 (9th Cir. 2006), is replaced in part and adopted in part, and the amended opinion filed on March 19, 2008, slip op. 2545, and appearing at 519 F.3d 838, is replaced in its entirety by the amended opinion filed concurrently with this order.

With this amended opinion, Judges Graber and Gould have voted to deny the Petition of the Federal Appellees for Panel Rehearing and Blackfeet Housing's Petition for Rehearing En banc. Judge Pregerson has voted to grant the petitions.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for panel rehearing or petitions for rehearing en banc may be filed.

App. 6

OPINION

GRABER, Circuit Judge:

Plaintiffs are members of the Blackfeet Indian Tribe who bought or leased houses built under the auspices of the United States Department of Housing and Urban Development ("HUD"). The houses had wooden foundations. The wood had been pressure-treated with toxic chemicals. Plaintiffs allege that the use of wooden foundations caused their houses to deteriorate and that the chemicals in the wood have caused, and continue to cause, health problems for those who live in the houses. On behalf of a class of persons similarly situated, Plaintiffs sued HUD, the Secretary of HUD, the Blackfeet Tribal Housing Authority and its board members ("the Housing Authority") under several theories. The district court dismissed the entire complaint under Federal Rule of Civil Procedure 12(b)(6).

On rehearing, we hold: (1) Plaintiffs must exhaust their tribal court remedies before bringing their claim against the Housing Authority; (2) the government did not undertake a trust responsibility toward Plaintiffs to construct houses or maintain or repair houses; and (3) Plaintiffs alleged sufficient facts to state claims against HUD under the Administrative Procedure Act ("APA"). We readopt our earlier opinion[1] with respect to Plaintiff's breach of contract claims. Accordingly, we affirm the district court's dismissal of the case except as to Plaintiffs' claims against the Housing Authority and its board members and Plaintiffs' claims under the APA. As to those claims, we reverse and remand for further proceedings.

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[1] *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974 (9th Cir. 2006).

App. 7

FACTUAL AND PROCEDURAL BACKGROUND

Because the district court dismissed the complaint for failure to state a claim, we construe the facts from Plaintiffs' complaint, which we must deem to be true, in the light most favorable to them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). But we "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

The Blackfeet Tribe is a federally recognized Indian tribe. In January 1977, the Tribe established a separate entity, the Blackfeet Housing Authority. *See* 24 C.F.R. § 805.109(c) (1977) (requiring, as a prerequisite to receiving a block grant from HUD, that a tribe form a HUD-approved tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance. Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977), *reprinted in* 24 C.F.R. § 805, subpt. A, app. I (1977). Thereafter, HUD granted the Blackfeet Housing Authority authorization and funding to build 153 houses.

Construction of those houses, and some additional ones, began after the Housing Authority came into being in 1977. Construction was completed by 1980.[2] The houses — at least in retrospect—were not well constructed. They had wooden foundations, and the wood products used in the foundations were pressure-treated with toxic chemicals. The crux of Plaintiffs' complaint is that HUD directed the use of pressure-treated wooden foundations, over the objection of tribal members, and that the Housing Authority acceded to that directive.

In the ensuing years, the foundations became vulnerable to the accumulation of moisture, including both groundwater and septic flooding, and to structural instability. Some of the

[2]In the district court, Plaintiffs' counsel stated that most of the houses were completed in 1978 and 1979, with "some follow-up into 1980."

houses have become uninhabitable due to contamination from toxic mold and dried sewage residues. The residents of the houses have experienced health problems, including frequent nosebleeds, hoarseness, headaches, malaise, asthma, kidney failure, and cancer.

Plaintiffs bought or leased the houses, either directly or indirectly, from the Housing Authority. After it became clear that the houses were unsafe or uninhabitable, Plaintiffs asked the Housing Authority and HUD to repair the existing houses, provide them with new houses, or pay them enough money to repair the houses or acquire substitute housing. When they received no help from either entity, Plaintiffs filed this class action against the Housing Authority, HUD, and the Secretary of HUD. Plaintiffs seek declaratory and injunctive relief and damages for alleged violations of statutory, contractual, and fiduciary duties.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim upon which relief can be granted. The Housing Authority and its board members filed a motion to dismiss because of tribal immunity. The district court granted those motions.

In our original opinion, we affirmed the dismissal of HUD and its Secretary, but reversed with respect to the Housing Authority. *Marceau v. Blackfeet Hous. Auth. (Marceau I)*, 455 F.3d 974 (9th Cir. 2006). We granted the Housing Authority's petition for rehearing and issued an amended opinion. *Marceau v. Blackfeet Hous. Auth. (Marceau II)*, 519 F.3d 838 (9th Cir. 2008). The Housing Authority and HUD filed separate petitions for review. We now issue this revised opinion.

STANDARD OF REVIEW

We review de novo each of the issues in this case. *See Coyle v. P.T. Garuda Indon.*, 363 F.3d 979, 984 n.7 (9th Cir.

2004) (concerning federal subject matter jurisdiction); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008) (concerning exhaustion of tribal court remedies).

DISCUSSION

A. *Claim against the Housing Authority*

Plaintiffs allege that the Blackfeet Housing Authority breached the covenants of habitability, merchantability, and good faith and fair dealing by selling defective homes to Plaintiffs. We decline to reach the merits of this contract claim because Plaintiffs first must exhaust their tribal court remedies.

[1] Principles of comity require federal courts to dismiss or to abstain from deciding claims over which tribal court jurisdiction is "colorable," provided that there is no evidence of bad faith or harassment. *Atwood*, 513 F.3d at 948. Exhaustion of tribal remedies is "mandatory." *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991). The parties failed to raise this issue until after we issued our opinion. Nevertheless, "[a] district court has no discretion to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court." *Allstate Indem. Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), *amended*, 197 F.3d 1031 (9th Cir. 1999). Although Plaintiffs' contract claim has not yet been brought in tribal court, "[t]he absence of any ongoing litigation over the same matter in tribal courts does not defeat the tribal exhaustion requirement." *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003) (per curiam); *see also United States v. Plainbull*, 957 F.2d 724, 728 (9th Cir. 1992) (holding that exhaustion of tribal remedies is "required even in the absence of a pending tribal court action").

[2] Tribal court jurisdiction over the contract disputes here is unquestionably colorable: Plaintiffs are tribal members, Defendant Blackfeet Housing Authority is a tribal entity, and

at least some key events—construction of the homes, for instance—occurred on tribal lands. *See Stock W. Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (en banc) (holding that tribal court jurisdiction was colorable where a *non-tribe* member sued a tribe in a contract and tort dispute and the key events *may* have taken place on tribal lands). Because there is no evidence of bad faith or harassment, we hold that Plaintiffs must exhaust their tribal court remedies. Accordingly, we remand the case. Because of the lengthy course of this litigation, the district court should stay, rather than dismiss, the action against the Housing Authority while Plaintiffs exhaust their tribal court remedies. *See Allstate Indem. Co.*, 191 F.3d at 1076 (remanding with instructions to stay action while party exhausted tribal court remedies). *Cf. Atwood*, 513 F.3d at 948 (approving a district court's discretionary decision to dismiss a domestic relations action when tribal court proceedings were pending).

[3] In our earlier opinions, we declined to require Plaintiffs to exhaust their tribal court remedies. Instead, we held that the Blackfeet Tribe had waived tribal immunity through the enabling ordinance that established the Housing Authority. *Marceau II*, 519 F.3d at 842-44; *Marceau I*, 455 F.3d at 978-83; *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (noting that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). Our doing so was in error, and we now vacate that holding and decline to reach the issue. Whether or not the Tribe waived tribal immunity, the tribal court must have the first opportunity to address all issues within its jurisdiction, including that one.

B. *Claim of Federal Trust Responsibility*

Plaintiffs allege that HUD violated its trust responsibility to them, as tribal members, "because of [HUD's] comprehensive and pervasive control of the monies, the property, the standards for constructing the homes, the standards for providing

mortgages for the homes, [and] the standards for who qualifies to live in the homes." Plaintiffs further allege that "[t]he corpus of the trust agreement is found in the statutes" concerning Indian housing. Before examining those statutes, we will set out some governing principles for interpreting them.

1. *Governing Principles*

[4] In general, a trust relationship exists between the United States and Indian Nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). But that relationship does not always translate into a cause of action.[3] In a pair of cases from the 1980s, the Supreme Court gave us guidance to determine when an actionable fiduciary duty toward Indians arises.

In *Mitchell I*, 445 U.S. at 541-46, tribal members on the Quinault Indian Reservation protested federal mismanagement of the tribe's timber resources. Although acknowledging that the Indian General Allotment Act of 1887 ("General Allotment Act"), ch. 119, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1976) (§§ 331-333 *repealed by* Pub. L. No. 106-462, § 106(a)(1) (2000)), established a trust relationship on behalf of Indians, the Court found that the relationship was "limited" and did not impose on the government a particular duty to manage timber resources. *Mitchell I*, 445 U.S. at 542. Instead, the federal government's trust responsibilities under the General Allotment Act were merely to prevent alienation of the land and to hold the land "immune from . . . state taxation." *Id.* at 544. Despite rejecting the tribe's claim under the Gen-

[3]A cognizable claim that rests on the federal government's trust obligation is enforceable through the Tucker Act, 28 U.S.C. § 1491, or the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206, 218, 226 (1983) (*Mitchell II*). A federal court's jurisdiction is identical whether conferred by the Tucker Act or the Indian Tucker Act. *See Mitchell I*, 445 U.S. at 538-39. As a result, for convenience and unless otherwise noted, we refer to both the Indian Tucker Act and the Tucker Act as "the Tucker Act" in this opinion.

eral Allotment Act, the Court remanded the case to the Court of Claims to consider whether other statutes might provide a basis for liability. *Id.* at 546.

When the case returned to it, the Supreme Court permitted a claim to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes that Congress had enacted after the General Allotment Act. *Id.* at 219-23. Those statutes directed the government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the Indian landowners. *Id.* The Court held that those statutes imposed strict and detailed duties on the government to manage forest lands. *Id.* at 224-25. In view of the pervasive and complete control exercised by the government over the lands, the statutes confirmed the existence of a fiduciary relationship. *Id.* Thus, the statutes satisfied the requirements for a claim of breach of fiduciary duty because they mandated the payment to Indians of money resulting from the management of Indian timber resources. *Id.* at 224-27.

[5] Together, *Mitchell I* and *Mitchell II* form the *Mitchell* doctrine: To create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue. Two 2003 Supreme Court decisions illustrate how the *Mitchell* doctrine applies: *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

We first address *Navajo Nation*. In 1964, the Navajo Nation—with approval from the Secretary of the Interior—entered into a lease with the corporate predecessor of the Peabody Coal Company for the mining of coal on tribal lands. 537 U.S. at 493. The lease provided for low royalty payments to the tribe. *Id.* at 495. Under the terms of the lease, the tribe and the mining company agreed to delegate power to the Secretary of the Interior to adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. *Id.* By

the 1980s, the royalties to the Navajo Nation equaled only about 2% of gross proceeds of the coal, while Congress had established a yield of 12.5% for coal mined on federal lands. *Id.* at 495-96.

Eventually, the Navajo Nation and Peabody negotiated a change in the royalty rate to 12.5%, retroactive to 1984. *Id.* at 498. The agreement also included other concessions by Peabody, including acceptance of tribal taxation of coal production. *Id.* at 498-99. In 1987, after the Navajo Tribal Council approved amendments to the lease and a final agreement was signed, the Secretary of the Interior approved the agreement. *Id.* at 500.

The tribe later learned that the Secretary had engaged in ex parte dealings with Peabody, without which, they alleged, the rate could have been as high as 20%. The Navajo Nation filed suit in the Court of Federal Claims, claiming that the Secretary of the Interior had breached the government's trust obligations by approving the 1987 amendments to the lease. *Id.* at 500. The tribe contended that the Indian Mineral Leasing Act of 1938 ("Indian Mineral Leasing Act"), ch. 198, 52 Stat. 347, 25 U.S.C. §§ 396a-496g, imposed a fiduciary obligation on the Secretary of the Interior to maximize financial returns from coal leases on Indian lands and that the royalty approved in 1987 was inadequate. *Navajo Nation*, 537 U.S. at 493.

[6] When the case reached the Supreme Court, the Court confirmed the primacy of *Mitchell I* and *Mitchell II* as "the pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.' " *Navajo Nation*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218). The Court explained the contrast between *Mitchell I* and *Mitchell II* as the difference between a " 'bare trust' " for a limited purpose and " 'full responsibility' " for management of Indian resources. *Id.* at 505 (quoting *Mitchell II*, 463 U.S. at 224). The Court held that a court's analysis of a statute

"must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 506.

Turning to the Indian Mineral Leasing Act, the Court held that the statute failed to establish even the "limited trust relationship," which the Court found insufficient to support a claim for relief in *Mitchell I*, because the statute did not include any trust language. *Id.* at 507-08. Instead, the statute "simply require[d] Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective and authorize[d] the Secretary generally to promulgate regulations governing mining operations." *Id.* at 507 (citations omitted). Further, because the Indian Mineral Leasing Act "aim[ed] to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties," the congressional purpose would be defeated by "[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands." *Id.* at 508.

On the same day as it issued *Navajo Nation*, the Supreme Court examined the trust doctrine in the context of overseeing the maintenance of buildings on land of the White Mountain Apache Tribe. *White Mountain Apache Tribe*, 537 U.S. 465. In 1870, the United States Army established Fort Apache in the White Mountains of Arizona. *Id.* at 468. In the 1920s, control of the fort was transferred to the Department of the Interior, which used part of the property as a school. *Id.* at 468-69. In 1960, Congress declared that Fort Apache be " 'held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose.' " *Id.* at 469 (quoting Pub. L. No. 86-392, 74 Stat. 8, 8 (1960 Act). In 1976, the National Park Service designated Fort Apache as a National Historic Site. *Id.*

The tribe brought suit, alleging that the Secretary of the Interior exercised the statutory prerogative to use the prop-

erty, but then failed to perform necessary maintenance and allowed Fort Apache to fall into disrepair. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999). An engineering assessment estimated that rehabilitating the property in accordance with standards for historic preservation would cost $14 million. *White Mountain Apache Tribe*, 537 U.S. at 469.

The Supreme Court held that an actionable fiduciary relationship existed between the federal government and the tribe. *Id.* at 468. The Court explained that a trust relationship alone is not enough to imply a remedy in damages; "a further source of law [is] needed to provide focus for the trust relationship." *Id.* at 477. In the case of the White Mountain Apache Tribe, that further source of law was the 1960 Fort Apache statute, which went "beyond a bare trust and permit[ted] a fair inference that the Government [was] subject to duties as a trustee and liable in damages for breach." *Id.* at 474. First, the 1960 Act "expressly define[d] a fiduciary relationship" by providing that Fort Apache was " 'held by the United States *in trust* for the White Mountain Apache Tribe.' " *Id.* (quoting 74 Stat. at 8) (emphasis added). Second, the United States exercised its discretionary authority under the statute to make actual use of the property, "not merely exercis[ing] daily supervision but . . . enjoy[ing] daily occupation." *Id.* at 475. Because the government assumed plenary control over the assets held in trust, the government likewise assumed an obligation, as trustee, to preserve those assets. *Id.*

2. *Housing on the Blackfeet Reservation*

To decide whether Plaintiffs have a viable claim for violation of a federal trust responsibility, we must examine the statutes and regulations pertaining to the Blackfeet houses at issue. After having done so, we conclude that HUD did not undertake a trust responsibility toward Plaintiffs to construct houses or to maintain or repair houses.

[7] During the period in which the houses were constructed, between 1977 and 1980, HUD provided federal funds to the Blackfeet Housing Authority pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 (1976). Under that statute and its implementing regulations for Indian housing, a tribe could establish an Indian housing authority. 24 C.F.R. §§ 805.108, 805.109 (1977). In "Annual Contributions Contracts," HUD agreed to provide a specified amount of money to fund projects undertaken by an Indian housing authority and approved by HUD. *Id.* §§ 805.102, 805.206. After securing funding from HUD, an Indian housing authority contracted with eligible American Indian families. *Id.* § 805.406. Eligible families contributed land, labor, or materials to the building of their houses. *Id.* § 805.408. After occupying its house, each family made monthly payments to the housing authority in an amount calibrated to the family's income. *Id.* § 805.416(a)(1)(ii). The Indian purchasers were responsible for maintaining their houses. *Id.* § 805.418(a).

[8] The express intent of Congress was "to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs." 42 U.S.C. § 1437 (1976). In other words, Congress specifically intended that HUD *not* assume more responsibility in developing and managing housing projects than was necessary. HUD was not without legal obligations, however. Congress also provided:

> The Department of Housing and Urban Development . . . shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will facilitate sustained progress in attaining the national housing objective hereby established, and in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the

> costs of housing without sacrifice of such sound standards; (3) the use of new designs, materials, techniques, and methods in residential construction, the use of standardized dimensions and methods of assembly of home-building materials and equipment, and the increase of efficiency in residential construction and maintenance; (4) the development of well-planned, integrated, residential neighborhoods and the development and redevelopment of communities; and (5) the stabilization of the housing industry at a high annual volume of residential construction.

42 U.S.C. § 1441. As we and our sister circuits have recognized, those goals create binding legal obligations on HUD. *Russell v. Landrieu*, 621 F.2d 1037, 1041 (9th Cir. 1980); *United States v. Winthrop Towers*, 628 F.2d 1028, 1034-36 (7th Cir. 1980); *Pennsylvania v. Lynn*, 501 F.2d 848, 855 (D.C. Cir. 1974); *see also Shannon v. U.S. Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 819-20 (3d Cir. 1970) (holding that plaintiff residents of HUD-administered homes could bring suit under the APA to challenge HUD actions allegedly not in accordance with the Housing Act). Those obligations apply to *all* HUD housing, however, and not just to housing constructed by Indian housing authorities.

Under its regulations, HUD had two general controls over Indian housing. First, HUD required that low-income housing meet Minimum Property Standards, 24 C.F.R. §§ 200.929, 805.212 (1977). Second, new construction could not exceed the "prototype costs" (HUD-approved ceiling or maximum costs for each type of dwelling) for a project, although the prototype costs could be revised upon request of a housing authority, either at application for a project or later when found to be necessary. 24 C.F.R. §§ 805.213(c), 805.214(b), 841.204 (1977).

Three important points bear emphasis. First, neither restriction was unique to Indian housing. Title 24 C.F.R. § 200.925

(1977) provided that *all* housing built under HUD programs, and not just housing built by Indian housing authorities, "shall meet or exceed HUD Minimum Property Standards." *See, e.g.*, 24 C.F.R. § 800.205(c)(1) (1977) (mandating that developers provide "detailed information" concerning the application of the Minimum Property Standards in their project applications); 24 C.F.R. § 841.107(c)(2) (1977) (requiring use of the Minimum Property Standards in other HUD-funded construction projects). Similarly, non-Indian housing construction projects had to comply with prototype cost limitations. *See, e.g.*, 24 C.F.R. §§ 841.115(b)(2), pt. 841, app. A (1977) (establishing limitations on dwelling construction and equipment costs based on the area prototype costs).

[9] Second, HUD regulations did not *require* the use of pressure-treated wooden foundations. With respect to foundations, HUD's Minimum Property Standards provided two alternative sets of minimum requirements, one for concrete or masonry walls below grade and one for pressure-treated wooden foundations. Dep't of Hous. & Urban Dev., *Handbook 4900.1: Minimum Property Standards for One and Two Family Dwellings* § 601-16 & app. E (1973 ed., rev. May 1979) ("*Minimum Property Standards Handbook*").

[10] Third, Indian housing authorities were not rigidly bound by either the Minimum Property Standards or the prototype cost limitations.[4] Indian housing authorities could choose to request variances from both the Minimum Property Standards and the prototype costs, if they believed that local conditions justified modifications. 24 C.F.R. §§ 805.212(a),

[4]Variances to the prototype cost limitations were likewise available to non-Indian housing authorities, but under somewhat different rules. 24 C.F.R. § 841.115(2) (1977). However, variances from HUD Minimum Property Standards generally were not available in non-Indian housing programs. *See* 24 C.F.R. § 841.107(c)(2) (1977) (mandating inclusion of HUD Minimum Property Standards as one of construction standards in design of public housing program projects); 24 C.F.R. § 883.208(a)(2) (1977) (requiring the same for Section 8 projects).

805.213(c) (1977). In a handbook published for use by Indian housing authorities, HUD characterized the introductory statements to the handbook on Minimum Property Standards as "stress[ing] the importance of flexibility to meet local conditions." Dep't of Hous. & Urban Dev., *Handbook 7440.1: Interim Indian Housing Handbook* § 3-5(a) (1976 ed., rev. Jan. 1978) ("*Indian Housing Handbook*"). As HUD emphasized:

> The [Indian Housing Authority] is responsible for the planning and development of Indian housing projects. The U.S. Housing Act of 1937 provides that local public housing agencies are to be vested with maximum responsibility for project administration and the Indian Self-Determination and Education Assistance Act emphasizes the importance of maximum Indian self-determination.

Indian Housing Handbook § 2-1(a).

Indeed, a 1979 amendment to the Indian housing regulations further emphasized the importance of maximizing Indian self-determination by removing the requirement that Indian housing comply with the HUD Minimum Property Standards in the absence of a waiver. Instead, the amendment required only that the design of Indian housing take into account the Minimum Property Standards, along with several other factors. 24 C.F.R. § 805.212(a) (1979). Thus, at the end of the period during which the housing in question was built, HUD was loosening, not tightening, the reins on the autonomy of Indian housing authorities that were receiving block grants.

By the time Plaintiffs filed their complaint in 2002, a new statutory regime was in effect under which Plaintiffs claim a federal trust obligation to repair or replace their houses.[5] In

[5]In 1988, Congress moved the authorization for Indian low-income housing to Title II of the United States Housing Act and formalized the

1996, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 4101-4243. As the 1996 statute's statement of congressional findings recognized, federal Indian housing assistance was to be provided "in a manner that recognizes the right of Indian self-determination and tribal self-governance" and with the "goals of economic self-sufficiency and self-determination for tribes and their members." 25 U.S.C. § 4101(6)-(7).

Under NAHASDA, HUD makes annual block grants, in amounts determined by a formula, to a tribe or its designated housing entity (such as an Indian housing authority), to carry out activities related to the provision of affordable housing. 25 U.S.C. §§ 4111(a), 4152; 24 C.F.R. §§ 1000.201, 1000.202, 1000.206, 1000.301-.340. To receive a block grant, a tribe must submit to HUD an Indian Housing Plan that meets certain requirements and that is subject to HUD's approval. 25 U.S.C. § 4111(b); 24 C.F.R. § 1000.201. But the housing plan is to be "locally driven." 24 C.F.R. § 1000.220. And HUD's statutorily prescribed role—in addition, of course, to providing the block grants themselves—is generally confined to "a limited review of each Indian housing plan," and even then "only to the extent that [HUD] considers review is necessary." 25 U.S.C. § 4113(a)(1). The grant, once made, is subject to tribal control; the recipient, rather than HUD, is responsible for operating the housing program, including the continued maintenance of housing. 25 U.S.C. § 4133. HUD's responsibility consists primarily of oversight and audit, to ensure that federal funds are spent for the intended purpose. 24 C.F.R. § 1000.520.

Indian housing program. Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 ("NAHASDA"). The 1988 statute did not govern at the time the Blackfeet housing was built, nor does it govern presently. For our purposes, the 1988 statute does not affect the analysis.

Ultimately, no statute ever required tribes to form housing authorities. No statute obliged Indian housing authorities, once formed, to seek federal funds. No statute committed the United States itself to construct houses on Indian lands or to manage or repair them. Indeed, the relevant regulations expressly imposed inspection duties on Indian housing authorities, independently of HUD, including any enforcement of warranties. 24 C.F.R. §§ 805.221(a), 805.417(a) (1977).

No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property.

Instead, this case most closely resembles *Navajo Nation*. Just as the Indian Mineral Leasing Act required Secretarial approval of leases, but did not oblige the Secretary to negotiate them, the United States Housing Act gave HUD a right of final inspection with respect to construction and design materials, 24 C.F.R. §§ 805.211-805.217 (1977), but did not oblige HUD to select them. Here, as there, the statute failed to include a federal managerial role. Here, as there, Congress expressed the aim of giving the lead role to an entity other than the government.

Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the Supreme Court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely

or unwisely) cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

[11] In summary, under the Housing Act, Indian housing authorities (such as the Blackfeet Housing Authority) applied to HUD for loans to enable *the housing authority* to develop low-income public housing designed to be sold to eligible members of the tribe. Under NAHASDA, block grants could be used *by the tribe* or its designated housing entity to repair or replace housing. As with any grant of federal funds, certain requirements had to be met to obtain and spend the funds. But the federal government held no property—land, houses, money, or anything else—in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal government did not build, manage, or maintain any of the housing. For these reasons, we adhere to our earlier ruling that the district court properly dismissed Plaintiffs' claim that HUD violated a trust responsibility. *Marceau I*, 455 F.3d at 983-85.

C. *Administrative Procedure Act*

Plaintiffs allege that they are entitled to relief under the APA, 5 U.S.C. §§ 702-706. The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. When reviewing an APA claim, a court may only (1) "compel agency action unlawfully withheld or unreasonably delayed"; or (2) "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2)(A).

[12] In this case, the primary relief sought by Plaintiffs is an injunction ordering HUD to repair (or, where necessary, rebuild) their homes. The district court erred in dismissing Plaintiffs' APA claim before allowing adequate development of the record. Plaintiffs' claim rests on two separate legal obligations that give rise to cognizable claims under the APA.

First, as discussed above, the regulations in effect when HUD approved the 153 Blackfeet homes in the late 1970s required that housing materials meet specified Minimum Property Standards. 24 C.F.R. § 805.212 (1979); *Indian Housing Handbook* §§ 3-19, 3-20. The Minimum Property Standards permitted, but did not require, the use of chemically treated lumber in the foundations of single- and double-family dwellings. *See* 24 C.F.R. § 200.925 & pt. 200, subpt. S, app.; *see also Minimum Property Standards Handbook* app. E, pp. E-1 and E-2. According to the complaint, HUD *required* Plaintiffs, in violation of its regulations, to use wooden foundations and, further, to use arsenic-treated lumber.

Second, as discussed above, 42 U.S.C. § 1441 imposes binding legal obligations on HUD. Of importance here, HUD is required to "encourage and assist . . . the production of housing of sound standards of design, construction, livability, and size for adequate family life." *Id.* Plaintiffs allege that, by requiring the use of arsenic-treated lumber, HUD violated 42 U.S.C. § 1441.

[13] At this stage in the litigation, the record is silent about whether HUD failed to comply with its own regulations and whether arsenic-treated lumber was within industry standards at the time. We therefore reverse the dismissal of Plaintiffs' APA claim and remand to the district court for further factual development.[6]

[6]Plaintiffs also seek an injunction ordering HUD to respond to their repeated requests for assistance. In *Marceau II*, 519 F.3d at 851-52, we held that HUD was under a legal obligation to respond to those requests.

[14] Under the APA, a plaintiff must seek "relief other than money damages." 5 U.S.C. § 702. Previously, we held that "the substance of [Plaintiffs'] claim is that they are owed money damages." *Marceau I*, 455 F.3d at 985. On rehearing, we now hold that Plaintiffs' request for an injunction ordering HUD to repair or rebuild their homes is not a suit for "money damages," as that term is used in § 702.

[15] In *Marceau I*, we followed the Fifth Circuit's ruling in *Amoco Products Co. v. Hodel*, 815 F.2d 352 (5th Cir. 1987), and looked to whether an award of money damages could substitute for the requested injunction. *See Marceau I*, 455 F.3d at 985 ("Here, money damages in an amount necessary to repair or rebuild Plaintiffs' home[s] would be a sufficient remedy, and, therefore, an injunction is not an available remedy."). After *Amoco*, the Supreme Court emphasized that the correct inquiry is whether the plaintiff seeks compensatory relief or instead seeks specific relief; the former constitutes "money damages" but the latter does not. *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988); *see also Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) ("*Bowen* held that Congress employed this language ['money damages'] to distinguish between specific relief and compensatory, or substitute, relief."). At least one federal circuit court has recognized that *Amoco* is no longer good law. *Doe v. United States*, 372 F.3d 1308, 1313-14 (Fed. Cir. 2004); *see also Nat'l Ass'n of Counties v. Baker*, 842 F.2d 369, 373 (D.C. Cir. 1988) (rejecting the *Amoco* rule in a case that predated *Bowen*).

We relied on the obligations found in 24 C.F.R. § 905.270 (1977), and 25 U.S.C. §§ 4111 and 4132(1). On rehearing, we now hold that HUD had no legal obligation to respond to Plaintiffs' requests, sufficient to give rise to a claim under the APA. Read broadly, those regulations and statutes impose an obligation on HUD to respond to properly formed requests for assistance by *housing authorities*. They do not require HUD to respond to requests by *homeowners* such as Plaintiffs, and there is no evidence in the record of a properly formed request for assistance by the Blackfeet Housing Authority.

[16] Plaintiffs seek an injunction, which constitutes specific relief. The injunction sought by Plaintiffs seeks not to compensate, but to "give the plaintiff[s] the very thing to which [they] w[ere] entitled." *Bowen*, 487 U.S. at 895 (internal quotation marks omitted). We therefore conclude that this relief is not "money damages" under 5 U.S.C. § 706. *See Bowen*, 487 U.S. at 893 ("[I]nsofar as the complaints sought declaratory and injunctive relief, they were certainly not actions for money damages."); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) ("The remedy that [the plaintiff] seeks in its complaint is, at bottom, specific performance of the . . . [c]ontract. An action for specific performance is not an action for 'money damages' under APA § 702, even if the remedy may actually require a payment of money by the government."). Consequently, Plaintiffs' APA claim seeking injunctive relief is not barred.

D. *Breach of Contract Claims*

[17] We readopt our earlier opinion, *Marceau I*, 455 F.3d at 986, concerning Plaintiffs' breach of contract claims against HUD. The district court lacked jurisdiction to hear those claims, so there remains nothing for us to review.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

PREGERSON, Circuit Judge, dissenting:

I concur in the majority's rulings on exhaustion of tribal remedies and the Administrative Procedure Act. I dissent with regard to the majority's analysis of federal trust responsibility, and write separately on that issue.

I. Factual Background[1]

Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440, HUD developed the Homeownership Program. HUD designed the Homeownership Program to meet the housing needs of low-income American Indian families. HUD entered into agreements called "Annual Contributions Contracts" with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authorities and pre-approved by HUD. *See* 24 C.F.R. § 805.102 (1979); *id.* § 805.206. After securing funding from HUD, a tribal housing authority would then contract with eligible American Indian families. *See id.* § 805.406. The program required families to contribute land, labor, or materials to the building of their house, *see id.* § 805.408, and after occupying the house, each family made monthly payments in an amount calibrated to their income, *see id.* § 805.416(a)(1)(ii). The homebuyers were responsible for maintenance of the house. *See id.* § 805.418(a).

Until 1988, when the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996), HUD operated the Homeownership Program under a series of regulations and its "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791, 793.

In 1977, the Blackfeet Tribe established a separate entity, the Blackfeet Housing Authority, as HUD regulations required. *See* 24 C.F.R. § 805.109(c) (1979) (requiring, as a prerequisite to receiving Homeownership Program funding, that tribes form a tribal housing authority). HUD published a

[1]These facts, except as noted, are taken from Plaintiffs' complaint, which is presumed true for purposes of this Rule 12(b)(6) proceeding.

model enabling ordinance, *reprinted in* 24 C.F.R. § 805, subpt. A, app. I (1979), which the Blackfeet Tribe adopted. The enabling ordinance charged the Blackfeet Housing Authority with "[a]lleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income" and "[r]emedying unsafe and [u]nsanitary housing conditions that are injurious to the public health, safety and morals." Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977). Thereafter, HUD granted the Housing Authority authorization and funding to build 153 homes.

Construction of the homes took place between 1979 and 1980. The homes, at least in retrospect, were not constructed well. The homes were built with wood foundations, and the wood products used to build the foundations were chemically treated with arsenic and other toxic chemicals. Plaintiffs allege, as the crux of their claim, that HUD *required* the use of wood foundations over the objection of tribal members, and that the Housing Authority acceded to that directive.

In the ensuing years, the foundations were, predictably, vulnerable to moisture accumulation and structural instability. Today, some of the houses are uninhabitable due to toxic mold and dried sewage residues. There has been a high incidence of cancer, asthma, kidney failure, respiratory problems, and other serious health problems among residents of the homes. Many residents have been advised to leave their houses for health reasons. Some residents, however, cannot leave because there are, quite simply, no affordable housing options in the area.

Plaintiffs purchased or leased these Homeownership Program homes either directly or indirectly from the Housing Authority. They made significant monthly payments and investments of their own time and/or resources, as required under the Homeownership Program. After it became clear that the houses were substandard and hazardous, Plaintiffs sought assistance from the Blackfeet Housing Authority and from

HUD in remedying the construction defects. When they received no assistance from either entity, Plaintiffs filed this class action complaint.

II. Analysis

A.

Plaintiffs allege that HUD has violated its trust responsibility to tribal members.[2] The federal government has substantial trust responsibilities toward Indians. These duties are part of the nature of the government-Indian relationship. "[A] fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians." *United States v. Mitchell*, ("*Mitchell* II"), 463 U.S. 206, 225 (1983).

1. *Historical Framework*

The federal government-Indian trust relationship dates back over a century. To appreciate the nature and extent of the government's responsibilities, and its failure to discharge them, I review the history of the government-Indian trust relationship.

The United States' relationship with the Indian tribes has almost always been "contentious and tragic." *Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001). In the early days of this nation, the federal government sought to put an end to the communal living and nomadic life common to so many tribes. The government (by treaty and/or by force) moved

[2]Count Three of Plaintiffs' original complaint alleged that HUD has violated: (a) the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437x; (b) the Indian Housing Act, 42 U.S.C. §§ 1437aa-1437ee; (c) the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243; and (d) the Housing Act of 1949, 42 U.S.C. §§ 1441-1490. On appeal, Plaintiffs did not challenge the district court's holding that no express or implied right of action existed under those statutes. Accordingly, I do not consider those statutes here.

Indians onto reservations. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

In the second half of the nineteenth century, the government replaced its policy of relocation with one of assimilation. This assimilationist policy began with treaties negotiated with individual tribes, and was eventually enacted into federal law with passage of the General Allotment Act of 1887, also known as the "Dawes Act," ch. 119, 24 Stat. 388 (as amended at 25 U.S.C. § 331 et seq.). Under the General Allotment Act, beneficial title of the lands allotted to tribes vested in the United States as trustee for individual Indians.[3]

The government then began to divide reservations and other Indian lands into individual parcels. The government essentially took the land it had earlier set aside for Indian tribes and re-allotted the land to individual tribe members. *See* Felix S. Cohen, Handbook of Federal Indian Law § 1.04 (2005 ed.). "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254,(1992). Once tribal lands were allotted in fee to individual tribal members, white settlers could purchase the lands from tribe members.

The federal government ceased allotting tribal lands to individuals with the enactment of the Indian Reorganization Act of 1934 ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.). Lands already allotted remained so, but the IRA provided that unallotted Indian lands would be returned to tribal ownership. 25 U.S.C. § 463.

In the 1950s, federal Indian policy shifted yet again as Congress adopted a "termination policy." Under termination,

[3]Where tribes resisted allotment, it could be imposed. *See* Act of June 28, 1898, ch. 517, 30 Stat. 495 ("Curtis Act").

Congress sought to release tribes from federal supervision and to terminate the government-Indian relationship. The purpose of this policy shift was specifically to sever the trust relationship. *Cobell*, 240 F.3d at 1088. During this period, Congress terminated numbers of tribes and withdrew its recognition of those tribes.

The termination policy was no more successful than earlier assimilation efforts, and was soon replaced with the current policy of self-determination and self-governance. In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975). Today, much tribally owned land is held in trust "indefinitely." 25 U.S.C. § 462.

2. *The Mitchell Doctrine*

Here, Plaintiffs argue that, as tribal members, HUD owed them a trust duty and it breached that duty. Claims based on the tribal trust duty are enforceable via the Tucker Act. In 1980, the Supreme Court held that the General Allotment Act, on its own, did not provide a substantive damage remedy enforceable through the Tucker Act. *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 541-46 (1980).

The tribe in *Mitchell I* protested federal mismanagement of its timber resources. Although acknowledging that the General Allotment Act did indeed establish a trust relationship on behalf of the Indians, the Court found the relationship to be a "limited" one that did not impose a duty to manage timber resources. *Id.* at 542. Under the Court's reading of the General Allotment Act, the trust responsibilities of the federal government under the statute were merely to prevent alienation of the land and to hold the land "immune from . . . state taxation." *Id.* at 544.

Although the *Mitchell I* Court rejected the tribe's claim as premised solely on the General Allotment Act, it remanded to

the Court of Claims for consideration of whether other statutes might provide a basis for liability. *Id.* at 546. Thus, the Court left the door open to continued pursuit of the claim against the federal government under alternative sources of law.

When the case returned to it, the Supreme Court permitted the Tucker Act suit to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes enacted subsequent to the General Allotment Act, which directed the government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the landowners. *Id.* at 219-24. The Court held that these statutes imposed strict duties upon the government to manage forestlands and specifically required the government to take into account the maintenance of the productive use of the land, the highest and best use of the land, and the financial needs of the owner and the owner's heirs. *Id.* The Court held that the statutes confirmed the existence of a fiduciary relationship, especially given the pervasive and complete control exercised by the government over these lands. *Id.*

Finally, in *Mitchell II* the Court concluded that because this fiduciary relationship specifically prescribed management of Indian timber resources, these statutes could fairly be interpreted as mandating the payment of money — thereby satisfying the standard for a Tucker Act action. *Id.* at 224-27. Moreover, the Court stated, absent a damages remedy, the fiduciary obligations of the United States would be largely unenforceable, because prospective relief would be inadequate and fail to deter federal officials from defaulting in their trust duties. *Id.* at 227-28.

Together, *Mitchell I* and *II* form the *Mitchell* doctrine, which outlines the circumstances under which the federal government owes a fiduciary duty to tribes. These cases indicate that the government's obligation must go beyond the mere general obligation that it owes to domestic dependent

sovereigns. A tribe must demonstrate specific statutory language indicating that the federal government has pervasive control over the resource at issue. Two decisions from 2003 clarify the *Mitchell* doctrine: *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

In 1964, the Navajo Nation, with the approval of the Secretary of the Interior, entered into a lease with the corporate predecessor of the Peabody Coal Company for coal mining on tribal lands. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (Ct. Cl. 2000). The lease provided for low initial royalty payments to the tribe. *Id.* Pursuant to the terms of the lease, the tribe and the mining company agreed to delegate power to the Secretary of the Interior to adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. *Id.* By the 1980s, the royalty payments to the Navajo Nation were only about two percent of gross proceeds on the coal, well below the twelve-and-a-half percent Congress had established for coal mined on federal lands. *Navajo Nation*, 537 U.S. at 496.

Subsequently, the Navajo Nation and the Peabody Mining Company negotiated a change in the royalty rate to twelve-and-a-half percent, retroactive to 1984, and included other concessions such as coal company acceptance of tribal taxation of coal production. *Id.* at 498. In 1987, after the Navajo Tribal Council approved the lease amendments and a final agreement was signed, Interior Secretary Hodel approved the negotiated agreement. *Id.* at 500. The tribe later learned that Secretary Hodel had engaged in backroom ex parte dealings with the coal company, without which the royalty rate would likely have been closer to twenty percent (not the twelve-and-a-half percent negotiated).

In 1993, the Navajo Nation filed suit in the Court of Federal Claims under both the Tucker Act and the Indian Tucker Act, claiming that the Secretary of the Interior breached the

government's trust obligations by approving the 1987 amendments to the lease. *Navajo Nation*, 46 Fed. Cl. at 220-21. The tribe contended that the Indian Mineral Leasing Act imposed a fiduciary obligation on the Secretary of the Interior to maximize the financial returns from coal leases and that the twelve-and-a-half percent royalty rate approved in 1987 was manifestly inadequate. *Id.* at 219-21.

In *Navajo Nation*, the Supreme Court confirmed the continued primacy of *Mitchell I* and *Mitchell II* as "the pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.' " 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218). The Court explained the contrast between *Mitchell I* and *Mitchell II* as that between a "bare trust" for limited purposes and "full responsibility" by the government for management of Indian resources. *Id.* at 505 (quoting *Mitchell II*, 463 U.S. at 224). The Court held that the statutory "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 506. However, once such a full fiduciary duty has been identified in the pertinent statute, the Court said that the availability of damages as a remedy "may be inferred," even if not expressly referred to in the statute. *Id.*

Turning to the Indian Mineral Leasing Act, the *Navajo Nation* Court ruled, "[t]he IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective and [further] authorizes the Secretary generally to promulgate regulations governing mining operations." *Id.* at 507. The statute, by failing to include a federal managerial role, did not establish the "limited trust relationship" needed to support a claim for relief. *Id.* at 507-08.

Further, the Court explained that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes." *Id.* at 508. Because "[t]he IMLA

aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties," the congressional purpose would be defeated by "[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands." *Id.*

In an opinion issued the same day as *Navajo Nation*, the Supreme Court examined the trust doctrine in the context of overseeing the maintenance of buildings on land of the White Mountain Apache Tribe. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

In 1870, the United States Army established Fort Apache in the White Mountains of east-central Arizona. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999). In the 1920s, control of the fort was transferred to the Department of the Interior, and part of the property was used as a school. *Id.* In 1960, Congress declared that Fort Apache "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8, 8 (1960). In 1976, the National Park Service designated Fort Apache as a National Historic Site. *White Mountain Apache Tribe*, 46 Fed. Cl. at 22.

As alleged by the tribe, the Secretary of the Interior exercised the statutory prerogative to use the property, but then allowed Fort Apache to fall into disrepair and failed to perform necessary maintenance. *Id.* The tribe commissioned an engineering assessment of the property. The assessment reported that it would cost roughly $14 million to rehabilitate the property in accordance with standards for historic preservation. *White Mountain Apache Tribe*, 537 U.S. at 469. The tribe brought suit in the Court of Claims arguing that the government had breached its fiduciary duty.

The Supreme Court held there to be an actionable fiduciary relationship. *Id.* at 468. In light of the *Mitchell* cases, the Court concluded that the Fort Apache trust statute "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach." *Id.* at 474. First, the 1960 Act "expressly defines a fiduciary relationship" by providing that Fort Apache be "held by the United States in trust for the White Mountain Apache Tribe." *Id.* (citing statute). Second, the United States exercised its discretionary authority to make actual use of the property, thus "not merely exercis[ing] daily supervision but . . . enjoy[ing] daily occupation." *Id.* at 475.

Accordingly, the Court held when the government assumes plenary control over assets held in trust, the government likewise assumes an obligation as trustee to preserve those assets, even absent express statutory delineation of duties of management and conservation. *Id.* As the Court observed, "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.* The Court explained that a trust relationship between the United States and Native Americans alone is not enough to imply a remedy in damages, and thus "a further source of law [is] needed to provide focus for the trust relationship." *Id.* at 477. But "once that focus [is] provided, general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *Id.*

The *Mitchell* cases, *Navajo Nation*, and *White Mountain Apache* together define the state of law with respect to the Indian trust doctrine. These cases stand for the proposition that tribes may successfully bring cases before the Court of Federal Claims seeking money damages based on the government's breach of a fiduciary duty. Hence, the trust doctrine gives rise to a viable Tucker Act claim. *See* George C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money and Sovereign Immunity* 29 Tulsa L. Rev. 313, 317 (2003)

(summarizing these important cases and discussing their interplay with the Tucker Act and the Indian Tucker Act).

Before the Court decided these cases, tribes and tribal members had to identify specific statutes stating a right to monetary relief from the government. *Id.* at 337. With these four cases, the Court has clarified that the trust relationship itself can establish a right to monetary relief. However, plaintiffs must go beyond asserting the general trust relationship between tribes and the government, and must allege a specific trust obligation tied to the resource at stake. In *Mitchell II*, the Court recognized that statutes established a pervasive federal regulation over timber resources adequate to demonstrate a trust relationship. In *White Mountain Apache*, the Court held that the federal government's occupation and management of land and buildings established a trust relationship. These cases demonstrate that where statutes and behavior create pervasive governmental control over a tribal resource, a specific trust relationship and concomitant fiduciary duty are created.

In *Navajo Nation*, the Court examined the Interior Department's control over mining resources and found no pervasive control. There, the Court held that the statutory framework only established a minor role for the federal government -- signing and approving mining leases that were negotiated and managed by the tribes. The Court found it particularly significant that the statute regarding the leases was designed to keep control of the resource in the hands of the tribe. In the wake of these cases, determining whether there is a trust relationship sufficiently detailed to create a viable claim under the Tucker Act requires a tailored inquiry into the resource at stake, the role of the federal agency involved, and the attendant statutory structure.

3. *Housing on the Blackfeet Reservation*

In assessing whether plaintiffs have a potential claim under the tribal trust doctrine, we examine the level of control the

federal government exercises over the tribal asset at issue. Here, the asset is housing. The federal government's pervasive control of housing on the Blackfeet reservation relates directly to the trust obligations the government owed the tribe.

Congress's decision to hold tribal land in trust has the practical result of eliminating the private housing market on tribal land because neither individual members of the tribe nor the tribe itself has an ownership interest that can be used as security. The government's decision to hold tribal land in trust shows Congress' intent to maintain pervasive control over the resource at stake and gives rise to a fiduciary duty in the government-created tribal housing market. However admirable the government's motivations, the decision to take tribal land in trust has had adverse consequences: by holding tribal land in trust and preventing alienation, the federal government foreclosed many options that exist in most private housing markets. In a recent publication, the United States Commission on Civil Rights reported that American Indians have consistently found it difficult to obtain mortgages on their land because the land is held in trust and therefore cannot be used as collateral. *See* United States Comm. on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country at 64, *available at* http://www.usccr.gov/pubs/na0703/na0731.pdf; *see also* H.R. Rep. 100-604, reprinted in 1988 U.S.C.C.A.N. 791, 795.

Similarly, private housing developers have been deterred from entering tribal housing markets because the property cannot be alienated. *Id.* at 64. The federal government exercises pervasive control over tribal land, and in so doing, severely limits the tribe's ability to control its own economic development in the area of housing. In fact, according to one House Report relating to the passage of the Indian Housing Act, HUD's Homeownership Program was the "only reasonable source of housing in many reservations," see H.R. Rep. 100-604, reprinted in 1988 U.S.C.C.A.N. 791, 795, in part because the land was held in trust.

Thus, while the goal of the General Allotment Act was to prevent unwise tribal alienation of the land, the result was to prevent building and improving housing. Restrictions operating on Indian lands prevent developers from entering the private tribal housing market, and leave tribes with no option but to wait for the federal government to provide decent, safe, and sanitary housing.

The government has often undertaken to provide tribal housing as an exercise of its special responsibility to the tribes. Congress has acknowledged federal control over tribal land and the government's attendant obligations. Congress has specifically noted that the federal government's general trust relationship with the tribes creates a responsibility for the federal government to remedy the deplorable housing conditions on reservations. *See* Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101(2)-(5). NAHASDA recognizes that:

> Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition; . . . [Moreover,] *providing affordable homes in safe and healthy environments is an essential element in the special role of the United States* in helping tribes and their members to improve their housing conditions and socioeconomic status.

25 U.S.C. § 4101(4)-(5) (emphasis added).

As indicated in the findings under NAHASDA, the federal government's duty to remedy tribal housing conditions existed even before NAHASDA — it derives from treaties and the "general course of dealing" with tribes. During the

process of forcing the tribes onto reservations, many tribes were explicitly promised housing in exchange for land cession. *See* Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. BlackLetter L.J. 211, 215-23 (2002). Others were promised money to "promote their civilization." *Id.* at 218-19; *see, e.g., White Mountain Apache Tribe v. United States*, 26 Cl.Ct. 446, 465, 466-67 (1992). The Blackfeet Tribe signed such a treaty. The Court of Claims has held that treaty language such as the "requisites to 'promote civilization' " includes housing. *White Mountain Apache*, 26 Cl. Ct. at 466-67. Treaty language and the relationship between the tribes and the federal government demonstrate that the federal government has long promised that it would assist American Indian tribes in providing housing.

When tribal land was taken into trust under the General Allotment Act, it was done to ensure that every Indian could have a "homestead of his own with assistance by the government to build houses and fences, and open farms." *See* Davis, 18 Harv. BlackLetter L.J. at 224 (quoting Comm'r of Indian Affairs, Annual Report iv-v (1885)). Henry Dawes, proponent of the General Allotment Act, stated that housing was a central element of the Act. *Id.* at 224. When the government took the land in trust, it committed itself to play a major role in housing the trust land's occupants.

Navajo Nation and *White Mountain Apache* delineate the ends of a continuum along which courts examine the *Mitchell* doctrine. In *White Mountain Apache*, the federal government's involvement was pervasive. The federal government occupied the land, built and maintained structures on the land, and managed the land. Additionally, federal legislation explicitly recognized a trust relationship between the government and the tribe with respect to management of the land. When the federal agency allowed the buildings on the land to fall into dangerous disrepair, the Court held that it had a fiduciary obligation regarding the buildings and the land. The

obligations surrounding the buildings had also been heightened by the National Park Service's designation of the area as a National Historic Site. Thus, the case demonstrates on-site involvement, oversight of the building and management of the structure, funding, and a statutory framework explicitly recognizing the trust relationship.

The present case is similar in several respects. The federal government controlled the design of the houses, set the building standards, approved all the designs and contracts, and provided funding. HUD's control of housing on tribal land and the Homeownership Program was pervasive.

HUD set the "prototype costs" for each locality, and required that the cost of construction and equipment could not exceed the prototype cost by more than ten percent. *See* Department of Housing and Urban Development, Manual 7440.1: Indian Housing Handbook 3-29 (March 1976). These prototype costs were based on the minimum property standards, standards that permitted the use of the wood foundations at issue here. Housing authorities proposed projects within the prototype cost, "carefully consider[ing] costs . . . to be sure that the project is completed at the lowest possible cost." Indian Housing Handbook 3-40. Even then, however, HUD approved the "development cost" allocated for each project. Indian Housing Handbook 3-40; 5-25. Any variation from the minimum property standards had to be HUD-approved. Indian Housing Handbook 5-25. HUD also had final say over design of the houses and the authority to alter tribally proposed designs in any way. The Indian Housing Handbook has a sample of every form, every contract, every checklist to be used from the first step to the last.

Thus, the only autonomy permitted to tribal housing authorities was the right to design a home within the price range set by HUD, a price range based on HUD's minimum property standards. Even then HUD could change the plans. This is hardly "maximum responsibility for project adminis-

tration" promised to the Housing Authority by HUD. *See* HUD Housing Manual 2-1.

The facts of this case confirm that the tribe had little control over how HUD housing would be built. Although the Blackfeet Housing Authority and occupants of the housing vigorously opposed use of wood foundations, it appears that they had no power to control the materials used. Thus, not only was HUD funding the only viable lending option on most tribal property, but it exerted almost total control over how the tribes would use the housing money they received to construct homes on land the government held in trust.

Thus, as with *Mitchell II*, there is pervasive management of a tribally owned resource to the exclusion of control by the tribal landholders. And, unlike *Mitchell I*, the very purpose for which the land was taken in trust — to prevent alienation — caused the injury at issue. Just as in *Mitchell II*, tribes were squeezed out of any role in their own tribal housing market.

The current case contrasts with the minimal federal control at issue in *Navajo Nation*. There, the Interior Department's only role was to approve leases. It did not manage the leases, negotiate the leases, or dictate their terms. The Interior Department did not provide any funding or oversight beyond lease approval. Although the Interior Secretary appeared to have conducted himself improperly by revealing confidential information to the mineral lessee, the Court held that there was no fiduciary duty and no trust asset in connection with the mineral leases. *Navajo Nation* represents minimal involvement, and it stands in sharp contrast to the pervasive regulation of housing on the Blackfeet reservation. The framework in this case is more akin to the system in *White Mountain Apache*.

An important element in both *Navajo Nation* and *White Mountain Apache* (and in the *Mitchell* cases) was the statutory framework regarding the resource in question. In *White*

Mountain Apache, statutory language used the word "trust" when acknowledging the obligation the government owed the tribe in relation to management of tribal land. In *Navajo Nation*, the statutory framework gave the tribe management of the resource. In *Mitchell II*, the Court examined several timber management statutes and noted that the statutory framework showed evidence of an intent by the federal government to pervasively control the tribe's timber resources. Based on the importance of statutory framework in a tribal trust analysis, the determining factor in the present analysis lies in the housing statutes that resulted in the construction of the substandard homes.

The homeowners base their trust claims on five statutes: the United States Housing Act of 1937 and 1949, 42 U.S.C. § 1437-1437x; the National Housing Act, 12 U.S.C. §§ 1715l(a), 1738(a); the Indian Housing Act of 1988, 42 U.S.C. § 1437aa-ff; and the Native American Housing and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 1702-1750.

At the time the houses were constructed for low-income families on the Blackfeet Indian Reservation in the 1970s, there was no specific statutory enactment applicable only to public housing on Indian lands. Federal low-income housing legislation was generally found in the U.S. Housing Act. *See* 42 U.S.C. §§ 1437-1437j (1976). The provisions in the U.S. Housing Act applied to all public housing, including housing on Indian reservations. *See* 42 U.S.C. § 1437a(6)-(7) (1976) (defining "public housing agency" to include entities "authorized" by, among other governmental agencies, "Indian tribes" to "engage in or assist in the development or operation of low-income housing").

Through the Housing Act, Congress appropriated money for low-income housing purposes, *see* 42 U.S.C. § 1437g(c), and authorized and directed the Secretary of HUD to award, or lend, any appropriated funds to eligible grantees, *see* 42

U.S.C. §§ 1437b, 1437c, 1437f, 1437g(a), & 1439(d). Local housing authorities could apply for loans and grants for the "development, acquisition, or operation of low-income housing projects." *See* 42 U.S.C. §§ 1437b, 1437c, 1437d(a), 1437g. Under the Housing Act, HUD could award funding and other benefits to tribal housing authorities. *See, e.g.*, 24 C.F.R. §§ 805.108-805.109 (1976) (relating to Indian housing authorities).

HUD implemented, by regulation, a "Mutual Help Homeownership Opportunity Program" on Indian lands to help meet the needs of low-income Indian families. The homes currently at issue were built under this regulatory program. Housing authorities could sell public housing to low-income families under "such terms and conditions as [HUD] may determine by regulation." 42 U.S.C. § 1437c(h) (1976). Under the Homeownership Program, an Indian housing authority could apply to HUD for loans to enable the housing authority to develop public housing designed for sale to eligible tribal members. *See* 24 C.F.R. §§ 805.404(a), 805.415, 805.416, 805.421, 805.422 (1976).

In 1988, nearly ten years after the Blackfeet low-income homes were completed, Congress enacted the Indian Housing Act. The Indian Housing Act was specific Indian housing legislation that moved all Indian public housing programs to a separate title of the U.S. Housing Act and provided express statutory authority for the Homeownership Program under 42 U.S.C. § 1437bb (1988). With the subsequent adoption of the NAHASDA in 1996, Congress moved Indian housing programs out of the U.S. Housing Act consolidating the programs under NAHASDA. HUD's involvement with Indian public housing programs is now controlled exclusively by the NAHASDA and its implementing regulations. Housing Authorities receive block grants under the NAHASDA, and HUD administers the grants. *See Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1195 (2002).

On their face, these statutes only establish a mechanism for lending money to tribal housing authorities. However, a review of the statutory framework and the Homeownership Program reveals a much more pervasive and controlling framework, as detailed above. The Homeownership Program details the requirements for the housing and connected contracts. There is no language indicating that the goal of the Homeownership Program is merely to help Indian tribes in managing their land and resources. The regulations do not defer to tribal authorities or tribal decision making, but instead explicitly detail what the tribal authorities are to do each step of the way. Federal control over the funds and the program is pervasive.

But pervasive control over a tribal housing program is not necessarily the same as federal control over the tribal resource. If the tribe chooses not to participate in this program (and therefore not receive the funding for housing), HUD has no input into the housing contracts, house designs, or materials used. Such a view, however, ignores the overarching housing issue. The federal government undertook, as part of its treaty and general trust relationship, to assist the Blackfeet tribe to acquire decent, safe, and sanitary housing for low-income families. The tribe had little choice but to accept the government housing program. HUD's Homeownership Program was the "only reasonable source of housing in many reservations," *see* H.R. Rep. 100-604, *reprinted in* 1988 U.S.C.C.A.N. 791, 795, and this was the case on the Blackfeet Reservation. Here, the federal government actively undertook to assist the Blackfeet to obtain desperately needed decent, safe, and sanitary housing. Labeling the housing program as simply one of "financing" ignores the fact that private lenders would not finance the construction of homes on reservation land held by the federal government, which actively undertook to assist the Blackfeet to obtain desperately needed decent, safe, and sanitary housing.

Because the government undertook to fulfill its trust responsibility to provide housing for the tribe and did so

through a pervasive regulatory structure, I would hold that the federal government, having undertaken this task, had an obligation to perform it in a manner consistent with its fiduciary duty to the tribe. Based on the facts set forth in the Complaint, I believe that the government breached that duty by requiring the tribes to use substandard, hazardous building materials during the construction of the homes and then refusing to repair or rebuild the homes. Accordingly, I concur in part, dissent in part.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Defendants-Appellees.

No. 04-35210

D.C. No. CV-02-00073-SEH

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted on Rehearing
May 9, 2007—Portland, Oregon

Filed July 21, 2006
Amended March 19, 2008

Before: Harry Pregerson, Susan P. Graber, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Graber;
Dissent by Judge Pregerson

SUMMARY

Government Law/Native Americans

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that the United States Department of Housing and Urban Development (HUD) did not undertake a trust responsibility toward tribe members to construct houses or to maintain or repair houses built under the auspices of HUD.

Appellants, members of the Blackfeet Indian tribe who purchased or leased substandard and possibly hazardous homes built under the auspices of HUD, filed a class action complaint in district court in Montana against appellees including HUD and the Blackfeet Tribal Housing Authority and its board members, seeking declaratory and injunctive relief and damages for alleged violations of statutory, contractual, and fiduciary duties. The homeowners made claims against HUD based on violations of the trust responsibility, the Administrative Procedure Act (APA), and breach of contract. The houses were built with wood foundations, using wood pressure-treated with toxic chemicals. The homeowners alleged that this caused their houses to deteriorate, and caused health problems for those who lived in the houses. HUD moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The tribal housing authority moved to dismiss based on tribal immunity. The district court granted both parties' motions to dismiss.

The homeowners appealed. In an earlier opinion, the court of appeals affirmed the dismissal of HUD, but reversed with

respect to the housing authority. On rehearing, the housing authority asked the court of appeals to dismiss the claims against it until tribal courts ruled on the question of whether the housing authority was immune from suit.

[1] Indian tribes generally enjoy immunity from suit. **[2]** Principles of comity generally require federal courts to dismiss, or abstain from deciding, cases in which a party asserts that an Indian tribal court possesses concurrent jurisdiction. **[3]** However, the tribal exhaustion rule is prudential rather than jurisdictional. Because it is a non-jurisdictional principle, the preference for tribal exhaustion may be forfeited. The housing authority forfeited the argument that the tribal court should decide the immunity issue by failing to raise it until its petition for rehearing. **[4]** It had to be concluded that the tribe waived the housing authority's tribal immunity.

[5] To create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue. **[6]** During the period in which the houses at issue were constructed, HUD provided federal funds to the Blackfeet Housing Authority pursuant to the United States Housing Act of 1937, 42 U.S.C. § 1437 (1976). **[7]** Congress specifically intended that HUD not assume more responsibility in developing and managing housing projects than was necessary. The block-grant statute applied across the board to all low-income housing, not specially or specifically to Indian housing, even though HUD promulgated separate regulations for Indian housing.

[8] Under its regulations, HUD had two general controls over Indian housing. First, HUD required that low-income housing meet minimum housing standards. Second, new construction could not exceed the "prototype costs" for the project, although the prototype costs could be revised upon request of a housing authority. **[9]** Neither restriction was unique to Indian housing. **[10]** HUD regulations did not

require the use of pressure-treated wooden foundations. [11] Indian housing authorities were not rigidly bound by either the minimum property standards or the prototype cost limitations. Indian housing authorities could choose to request variances from both the minimum property standards and the prototype costs, if they believed that local conditions justified modifications. [12] Ultimately, no statute ever required tribes to form housing authorities. [13] No statute has imposed duties on the government to manage or maintain the property, nor has any HUD regulation done so. [14] The United States Housing Act gave HUD a right of final inspection with respect to construction and design materials, but did not oblige HUD to select them. The statute failed to include a federal managerial role. Here, as there, Congress expressed the aim of giving the lead role to an entity other than the government. [15] Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone could not alter the legal relationship between the parties. [16] The district court properly dismissed the homeowners' claim that HUD violated a trust responsibility.

[17] The APA authorizes suit by a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute. [18] A claim under the APA requires, among other things, that the claimant seek relief other than money damages. [19] In this case, the homeowners sought a declaration that HUD has violated its legal obligations, and they sought equitable relief in the form of repairs of their homes. [20] It had to be concluded that the homeowners' claims for declaratory and injunctive relief were distinct from money damages. [21] The district court erred in dismissing the homeowners' claims for declaratory and injunctive relief under the APA before allowing adequate development of the record. The judgment of the district court had to be reversed on this issue.

Judge Pregerson dissented with regard to the majority's analysis of federal trust responsibility, writing that the federal

government, having undertaken to fulfill its trust responsibility to provide housing for the tribe through a pervasive regulatory structure, had an obligation to perform it in a manner consistent with its fiduciary duty to the tribe, and breached that duty by requiring the tribes to use substandard, hazardous building materials during the construction of the homes and then refusing to repair or rebuild the homes.

COUNSEL

Thomas E. Towe, Towe, Ball, Enright, Mackey & Sommerfeld, PLLP, Billings, Montana; Jeffrey A. Simkovic, Simkovic Law Firm, Billings, Montana; Mary Ann Sutton, Attorney at Law, Missoula, Montana, for the plaintiffs-appellants.

Stephen A. Doherty and Patrick L. Smith, Smith, Doherty & Belcourt, P.C., Great Falls, Montana; Timothy J. Cavan, Assistant U.S. Attorney, Billings, Montana, for the defendants-appellees.

John T. Harrison, Confederated Salish and Kootenai Tribes, Tribal Legal Department, Pablo, Montana; Patterson V. Joe, Patterson V. Joe, P.C., Flagstaff, Arizona, for the amici.

ORDER

The opinion filed on July 21, 2006, slip op. 8071, and appearing at 455 F.3d 974 (9th Cir. 2006), is replaced in part and adopted in part by the amended opinion filed concurrently with this order. Further petitions for rehearing and petitions for rehearing en banc may be filed.

OPINION

GRABER, Circuit Judge:

Plaintiffs are members of the Blackfeet Indian Tribe who bought or leased houses built under the auspices of the United States Department of Housing and Urban Development ("HUD"). The houses had wooden foundations. The wood had been pressure-treated with toxic chemicals. Plaintiffs allege that the use of wooden foundations caused their houses to deteriorate and that the chemicals in the wood have caused, and continue to cause, health problems for those who live in the houses. On behalf of a class of persons similarly situated, Plaintiffs sued HUD, the Secretary of HUD, the Blackfeet Tribal Housing Authority and its board members ("the Housing Authority") under several theories. The district court dismissed the entire complaint under Federal Rule of Civil Procedure 12(b)(6).

On rehearing, we hold: (1) the Housing Authority forfeited its claim to tribal exhaustion and, in any event, waived its tribal immunity; (2) the government did not undertake a trust responsibility toward Plaintiffs to construct houses or maintain or repair houses; and (3) Plaintiffs alleged sufficient facts to state claims against HUD under the Administrative Procedure Act ("APA"). We readopt our earlier opinion[1] with respect to Plaintiff's breach of contract claims. Accordingly, we affirm the district court's dismissal of the case except as to Plaintiffs' claims against the Housing Authority and its board members and Plaintiffs' claims under the APA. As to those claims, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Because the district court dismissed the amended complaint for failure to state a claim, we construe the facts from Plain-

[1] *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006)

tiffs' amended complaint, which we must deem to be true, in the light most favorable to them. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). But we "need not assume the truth of legal conclusions cast in the form of factual allegations." *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

The Blackfeet Tribe is a federally recognized Indian tribe. In January 1977, the Tribe established a separate entity, the Blackfeet Housing Authority. *See* 24 C.F.R. § 805.109(c) (1977) (requiring, as a prerequisite to receiving a block grant from HUD, that a tribe form a HUD-approved tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance. Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977), *reprinted in* 24 C.F.R. § 805, subpt. A, app. I (1977). Thereafter, HUD granted the Blackfeet Housing Authority authorization and funding to build 153 houses.

Construction of those houses, and some additional ones, began after the Housing Authority came into being in 1977. Construction was completed by 1980.[2] The houses—at least in retrospect—were not well constructed. They had wooden foundations, and the wood products used in the foundations were pressure-treated with toxic chemicals. The crux of Plaintiffs' complaint is that HUD directed the use of pressure-treated wooden foundations, over the objection of tribal members, and that the Housing Authority acceded to that directive.

In the ensuing years, the foundations became vulnerable to the accumulation of moisture, including both groundwater and septic flooding, and to structural instability. Some of the houses have become uninhabitable due to contamination from toxic mold and dried sewage residues. The residents of the houses have experienced health problems, including frequent

[2]In the district court, Plaintiffs' counsel stated that most of the houses were completed in 1978 and 1979, with "some follow-up into 1980."

nosebleeds, hoarseness, headaches, malaise, asthma, kidney failure, and cancer.

Plaintiffs bought or leased the houses, either directly or indirectly, from the Housing Authority. After it became clear that the houses were unsafe or uninhabitable, Plaintiffs asked the Housing Authority and HUD to repair the existing houses, provide them with new houses, or pay them enough money to repair the houses or acquire substitute housing. When they received no help from either entity, Plaintiffs filed this class action against the Housing Authority, HUD, and the Secretary of HUD. Plaintiffs seek declaratory and injunctive relief and damages for alleged violations of statutory, contractual, and fiduciary duties.

HUD filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim upon which relief can be granted. The Housing Authority and its board members filed a motion to dismiss because of tribal immunity. The district court granted those motions. In an earlier opinion, we affirmed the dismissal of HUD and its Secretary, but reversed with respect to the Housing Authority. *Marceau v. Blackfeet Hous. Auth.*, 455 F.3d 974 (9th Cir. 2006). The Housing Authority filed a petition for rehearing. The panel granted the petition and reheard the case. All parties, as well as amici curiae, participated in the rehearing. We now issue this revised opinion.

STANDARD OF REVIEW

We review de novo each of the issues in this case. *See Coyle v. P.T. Garuda Indon.*, 363 F.3d 979, 984 n.7 (9th Cir. 2004) (concerning federal subject matter jurisdiction); *Demontiney v. United States*, 255 F.3d 801, 805 (9th Cir. 2001) (concerning an Indian tribe's sovereign immunity and the waiver thereof, waiver of the United States' sovereign immunity, and dismissal for failure to state a claim under Rule 12(b)(6)).

DISCUSSION

A. *Tribal Immunity*

[1] Indian tribes generally enjoy immunity from suit. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) (noting that "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity"). In our earlier opinion, we held that the Blackfeet Tribe waived tribal immunity through the enabling ordinance that established the Housing Authority.[3] *Marceau*, 455 F.3d at 978 83. On rehearing, the Housing Authority urges us to dismiss the claims against it, or at least to abstain from considering those claims until tribal courts rule on the question whether the Housing Authority is immune from suit. For two reasons, we are not persuaded that we should do either.

[2] We begin by recognizing that principles of comity generally require federal courts to dismiss, or abstain from deciding, cases in which a party asserts that an Indian tribal court possesses concurrent jurisdiction. *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir. 1991); *see also Wellman v. Chevron U.S.A., Inc.*, 815 F.2d 577, 578 (9th Cir. 1987) ("Considerations of comity require the exhaustion of tribal remedies before the [tribal court's jurisdiction] may be addressed by the district court."). Ordinarily, exhaustion of tribal remedies is mandatory. *Burlington N. R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

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[3]Blackfeet Tribal Ordinance No. 7, art. V, § 2 (Jan. 4, 1977), states:

> The [Blackfeet Tribal] Council hereby gives its irrevocable consent to allowing the [Housing] Authority to *sue and be sued* in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have, but the Tribe shall not be liable for the debts or obligations of the Authority.

(Emphasis added.)

[3] But the Supreme Court has stated that the tribal exhaustion rule is "prudential" rather than "jurisdictional." *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). Because it is a non-jurisdictional principle, the preference for tribal exhaustion may be forfeited. The Housing Authority forfeited the argument that the tribal court should decide the immunity issue by failing to raise it until the Housing Authority's petition for rehearing. *Talk of the Town v. Dep't of Fin. & Bus. Servs.*, 353 F.3d 650, 650 (9th Cir. 2003). That being so, we readopt our earlier opinion on this issue, *Marceau*, 455 F.3d at 978-83.

Moreover, in this case, the tribal court already has ruled on the question. In *DeRoche v. Blackfeet Indian Housing Authority*, 17 Indian L. Rptr. 6036 (Blackfeet Trib. Ct. App. 1989), the Blackfeet Tribal Court of Appeals considered a breach of contract claim against the Housing Authority. That court adopted the Eighth Circuit's approach to interpreting a "sue and be sued" clause. *Id.* at 6042 (citing *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975). The Blackfeet Tribal Court of Appeals held that the original Housing Authority enabling ordinance "is an indisputable qualified waiver of immunity by the Blackfeet Tribe and housing authority for a breach of contract action" and that, by adopting the clause," the tribe waived, to some extent, the housing authority's immunity from suit." *Id.* The court thus allowed the contract claim to proceed. *Id. DeRoche* is the only Blackfeet appellate decision, and it is on point. Even if exhaustion in tribal court were warranted, abstention would not be required. *DeRoche* is binding tribal precedent, and we would defer to the tribal court's extant interpretation. *See Hinshaw v. Mahler*, 42 F.3d 1178, 1180 (9th Cir. 1994) ("The Tribal Court's interpretation of tribal law is binding on this court.").[4]

[4]The Housing Authority points to *Whiteman v. Blackfeet Indian Housing Authority*, No. 97 CA 474 (Blackfeet Tribal Ct. Aug. 25, 1999), for the

[4] Thus, the tribal appellate court and this court agree that the Tribe waived the Housing Authority's tribal immunity. Whether the Housing Authority forfeited the issue of deference to the tribal court, or whether exhaustion applies, the result is the same.

B. *Claim of Federal Trust Responsibility*

Plaintiffs allege that HUD violated its trust responsibility to them, as tribal members, "because of [HUD's] comprehensive and pervasive control of the monies, the property, the standards for constructing the homes, the standards for providing mortgages for the homes, [and] the standards for who qualifies to live in the homes." Plaintiffs further allege that "[t]he corpus of the trust agreement is found in the statutes" concerning Indian housing. Before examining those statutes, we will set out some governing principles for interpreting them.

1. *Governing Principles*

In general, a trust relationship exists between the United States and Indian Nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). But that relationship does not always translate into a cause of action.[5] In a pair of cases from

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proposition that a tribal court has held that the ordinance in question did not waive tribal immunity. *Whiteman* is a decision of a Blackfeet trial court, while *DeRoche* is a published opinion of the Blackfeet Tribal Court of Appeals. *Whiteman* can take away nothing from *DeRoche*, any more than a district court's later ruling can detract from an earlier holding of this court concerning the same subject. "Binding authority must be followed unless and until overruled by a body competent to do so." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001); *see also id.* at 1170 & n.24 ("A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue . . . [C]aselaw on point *is* the law."). There is but one controlling precedent from the tribal courts, and that is *DeRoche*.

[5]A cognizable claim that rests on the federal government's trust obligation is enforceable through the Tucker Act, 28 U.S.C. § 1491, or the

the 1980s, the Supreme Court gave us guidance to determine when an actionable fiduciary duty toward Indians arises.

In *Mitchell I*, 445 U.S. at 541-46, tribal members on the Quinault Indian Reservation protested federal mismanagement of the tribe's timber resources. Although acknowledging that the Indian General Allotment Act of 1887 ("General Allotment Act"), ch. 119, 24 Stat. 388, 25 U.S.C. §§ 331-358 (1976) (§§ 331-333 *repealed by* Pub. L. No. 106-462, § 106(a)(1) (2000)), established a trust relationship on behalf of Indians, the Court found that the relationship was "limited" and did not impose on the government a particular duty to manage timber resources. *Mitchell I*, 445 U.S. at 542. Instead, the federal government's trust responsibilities under the General Allotment Act were merely to prevent alienation of the land and to hold the land "immune from . . . state taxation." *Id.* at 544. Despite rejecting the tribe's claim under the General Allotment Act, the Court remanded the case to the Court of Claims to consider whether other statutes might provide a basis for liability. *Id.* at 546.

When the case returned to it, the Supreme Court permitted a claim to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes that Congress had enacted after the General Allotment Act. *Id.* at 219-24. Those statutes directed the government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the Indian landowners. The Court held that those statutes imposed strict and detailed duties on the government to manage forest lands. In view of the pervasive and complete control exercised

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Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206, 218, 226 (1983) (*Mitchell II*). A federal court's jurisdiction is identical whether conferred by the Tucker Act or the Indian Tucker Act. *See Mitchell I*, 445 U.S. at 538-39. As a result, for convenience and unless otherwise noted, we refer to both the Indian Tucker Act and the Tucker Act as "the Tucker Act" in this opinion.

by the government over the lands, the statutes confirmed the existence of a fiduciary relationship. *Id.* Thus, the statutes satisfied the requirements for a claim of breach of fiduciary duty because they mandated the payment to Indians of money resulting from the management of Indian timber resources. *Id.* at 224-27.

[5] Together, *Mitchell I* and *Mitchell II* form the *Mitchell* doctrine: To create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue. Two 2003 Supreme Court decisions illustrate how the *Mitchell* doctrine applies: *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

We first address *Navajo Nation*. In 1964, the Navajo Nation—with approval from the Secretary of the Interior—entered into a lease with the corporate predecessor of the Peabody Coal Company for the mining of coal on tribal lands. 537 U.S. at 493. The lease provided for low royalty payments to the tribe. *Id.* at 495. Under the terms of the lease, the tribe and the mining company agreed to delegate power to the Secretary of the Interior to adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. *Id.* By the 1980s, the royalties to the Navajo Nation equaled only about 2% of gross proceeds of the coal, while Congress had established a yield of 12.5% for coal mined on federal lands. *Id.* at 495-96.

Eventually, the Navajo Nation and Peabody negotiated a change in the royalty rate to 12.5%, retroactive to 1984. *Id.* at 498. The agreement also included other concessions by Peabody, including acceptance of tribal taxation of coal production. *Id.* at 498-99. In 1987, after the Navajo Tribal Council approved amendments to the lease and a final agreement was signed, the Secretary of the Interior approved the agreement. *Id.* at 500.

The tribe later learned that the Secretary had engaged in ex parte dealings with Peabody, without which, they alleged, the rate could have been as high as 20%. The Navajo Nation filed suit in the Court of Federal Claims, claiming that the Secretary of the Interior had breached the government's trust obligations by approving the 1987 amendments to the lease. *Id.* at 500. The tribe contended that the Indian Mineral Leasing Act of 1938 ("Indian Mineral Leasing Act"), ch. 198, 52 Stat. 347, 25 U.S.C. §§ 396a-496g, imposed a fiduciary obligation on the Secretary of the Interior to maximize financial returns from coal leases on Indian lands and that the royalty approved in 1987 was inadequate. *Navajo Nation*, 537 U.S. at 493.

When the case reached the Supreme Court, the Court confirmed the primacy of *Mitchell I* and *Mitchell II* as "the path-marking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.' " *Navajo Nation*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218). The Court explained the contrast between *Mitchell I* and *Mitchell II* as the difference between a " 'bare trust' " for a limited purpose and " 'full responsibility' " for management of Indian resources. *Id.* at 505 (quoting *Mitchell II*, 463 U.S. at 224). The Court held that a court's analysis of a statute "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 506.

Turning to the Indian Mineral Leasing Act, the Court held that the statute failed to establish even the "limited trust relationship," which the Court found insufficient to support a claim for relief in *Mitchell I*, because the statute did not include any trust language. *Id.* at 507-08. Instead, the statute "simply require[d] Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective and authorize[d] the Secretary generally to promulgate regulations governing mining operations." *Id.* at 507 (citations omitted). Further, because the Indian Mineral Leasing Act "aim[ed] to enhance tribal self-determination by giv-

ing Tribes, not the Government, the lead role in negotiating mining leases with third parties," the congressional purpose would be defeated by "[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands." *Id.* at 508.

On the same day as it issued *Navajo Nation*, the Supreme Court examined the trust doctrine in the context of overseeing the maintenance of buildings on land of the White Mountain Apache Tribe. *White Mountain Apache Tribe*, 537 U.S. 465. In 1870, the United States Army established Fort Apache in the White Mountains of Arizona. *Id.* at 468. In the 1920s, control of the fort was transferred to the Department of the Interior, which used part of the property as a school. *Id.* at 468-69. In 1960, Congress declared that Fort Apache be " 'held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for the purpose.' " *Id.* at 469 (quoting Pub. L. No. 86-392, 74 Stat. 8, 8 (1960 Act). In 1976, the National Park Service designated Fort Apache as a National Historic Site. *Id.*

The tribe brought suit, alleging that the Secretary of the Interior exercised the statutory prerogative to use the property, but then failed to perform necessary maintenance and allowed Fort Apache to fall into disrepair. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999). An engineering assessment estimated that rehabilitating the property in accordance with standards for historic preservation would cost $14 million. *White Mountain Apache Tribe*, 537 U.S. at 469.

The Supreme Court held that an actionable fiduciary relationship existed between the federal government and the tribe. *Id.* at 468. The Court explained that a trust relationship alone is not enough to imply a remedy in damages; "a further source of law [is] needed to provide focus for the trust relationship."

Id. at 477. In the case of the White Mountain Apache Tribe, that further source of law was the 1960 Fort Apache statute, which went "beyond a bare trust and permit[ted] a fair inference that the Government [was] subject to duties as a trustee and liable in damages for breach." *Id.* at 474. First, the 1960 Act "expressly define[d] a fiduciary relationship" by providing that Fort Apache was " 'held by the United States *in trust* for the White Mountain Apache Tribe.' " *Id.* (quoting 74 Stat. at 8) (emphasis added). Second, the United States exercised its discretionary authority under the statute to make actual use of the property, "not merely exercis[ing] daily supervision but . . . enjoy[ing] daily occupation." *Id.* at 475. Because the government assumed plenary control over the assets held in trust, the government likewise assumed an obligation, as trustee, to preserve those assets. *Id.*

2. *Housing on the Blackfeet Reservation*

To decide whether Plaintiffs have a viable claim for violation of a federal trust responsibility, we must examine the statutes and regulations pertaining to the Blackfeet houses at issue. After having done so, we conclude that HUD did not undertake a trust responsibility toward Plaintiffs to construct houses or to maintain or repair houses.

[6] During the period in which the houses were constructed, between 1977 and 1980, HUD provided federal funds to the Blackfeet Housing Authority pursuant to the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440 (1976). Under that statute and its implementing regulations for Indian housing,[6] HUD provided block grants with which an Indian housing authority could organize the construction of homes through its own contractors. In "Annual Contributions Contracts," HUD agreed to provide a specified amount of money to fund projects undertaken by a tribal housing authority and approved by HUD. 24 C.F.R. §§ 805.102, 805.206 (1977). After securing

[6]24 C.F.R. §§ 805.404(a), 805.415, 805.416, 805.421, 805.422 (1977).

funding from HUD, a tribal housing authority contracted with eligible American Indian families. *Id.* § 805.406. Eligible families contributed land, labor, or materials to the building of their houses. *Id.* § 805.408. After occupying its house, each family made monthly payments to the housing authority in an amount calibrated to the family's income. *Id.* § 805.416(a)(1)(ii). The Indian purchasers were responsible for maintaining their houses. *Id.* § 805.418(a).

[7] Significantly, the statute under which HUD established that program, 42 U.S.C. § 1437 (1976), provided in relevant part:

> It is the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income and, consistent with the objectives of this chapter, *to vest in local public housing agencies the maximum amount of responsibility in the administration of their housing programs.*

(Emphasis added.) For the purpose of our analysis, two points are notable. First, as the text just emphasized demonstrates, Congress gave housing authorities the greatest responsibility in administering their low-income housing programs. That is, Congress specifically intended that HUD *not* assume more responsibility in developing and managing housing projects than was necessary. Second, Congress defined the term "states" to include "Indian tribes, bands, groups, and Nations." 42 U.S.C. § 1437a(7). In other words, the block-grant statute applied across the board to all low-income housing, not specially or specifically to Indian housing, even though HUD promulgated separate regulations for Indian housing. *See Artichoke Joe's Cal. Grand Casino v. Norton*,

353 F.3d 712, 729 (9th Cir. 2003) (reaffirming the rule that statutes are construed liberally in favor of Indians only when the statute is passed for the benefit of Indian tribes and the statute is ambiguous).

[8] Under its regulations, HUD had two general controls over Indian housing. First, HUD required that low-income housing meet Minimum Housing Standards, 24 C.F.R. §§ 200.929, 805.212 (1977). Second, new construction could not exceed the "prototype costs" for the project,[7] although the prototype costs could be revised upon request of a housing authority, either at application for a project or later when found to be necessary. 24 C.F.R. §§ 805.213(c), 805.214(b) (1977).

[9] Three important points bear emphasis. First, neither restriction was unique to Indian housing. Title 24 C.F.R. § 200.925 (1977) provided that *all* housing built under HUD programs "shall meet or exceed HUD Minimum Property Standards." *See, e.g.*, 24 C.F.R. § 800.205(c)(1) (1977) (mandating that developers provide "detailed information" concerning the application of the Minimum Property Standards in their project applications); 24 C.F.R. § 841.107(c)(2) (1977) (requiring use of the Minimum Property Standards in other HUD-funded construction projects). Similarly, non-Indian housing construction projects had to comply with prototype cost limitations. *See, e.g.*, 24 C.F.R. §§ 841.115(b)(2), pt. 841, app. A (1977) (establishing limitations on dwelling construction and equipment costs based on the area prototype costs).

[10] Second, HUD regulations did not require the use of pressure-treated wooden foundations. With respect to foundations, HUD's Minimum Property Standards established minimum criteria in section 601-16. Dep't of Hous. & Urban Dev., *Handbook 4900.1: Minimum Property Standards for One and*

[7]Prototype costs are the HUD-approved ceiling or maximum costs for each type of dwelling. 24 C.F.R. § 841.204 (1977).

Two Family Dwellings § 601-16 (1973 ed., rev. May 1979) ("*Minimum Property Standards Handbook*"). That regulation provided two alternative sets of minimum requirements, one for concrete or masonry walls below grade, *id.* § 601-16.4, and one for pressure-treated wooden foundations, *id.* at app. E.

[11] Third, Indian housing authorities were not rigidly bound by either the Minimum Property Standards or the prototype cost limitations.[8] Indian housing authorities could choose to request variances from both the Minimum Property Standards and the prototype costs, if they believed that local conditions justified modifications. 24 C.F.R. §§ 805.212(a), 805.213(c) (1977). In a handbook published for use by Indian housing authorities, HUD characterized the introductory statements to the handbook on Minimum Property Standards as "stress[ing] the importance of flexibility to meet local conditions." Dep't of Hous. & Urban Dev., *Handbook 7440.1: Interim Indian Housing Handbook* § 3-5(a) (1976 ed., rev. Jan. 1978) ("*Indian Housing Handbook*"). As HUD emphasized:

> The [Indian Housing Authority] is responsible for the planning and development of Indian housing projects. The U.S. Housing Act of 1937 provides that local public housing agencies are to be vested with maximum responsibility for project administration and the Indian Self-Determination and Education Assistance Act emphasizes the importance of maximum Indian self-determination.

[8] Variances to the prototype cost limitations were likewise available to non-Indian housing authorities, but under somewhat different rules. 24 C.F.R. § 841.115(2) (1977). However, variances from HUD Minimum Property Standards generally were not available in non-Indian housing programs. *See* 24 C.F.R. § 841.107(c)(2) (1977) (mandating inclusion of HUD Minimum Property Standards as one of construction standards in design of public housing program projects); 24 C.F.R. § 883.208(a)(2) (1977) (requiring the same for Section 8 projects).

Indian Housing Handbook § 2-1(a).

Indeed, a 1979 amendment to the Indian housing regulations further emphasized the importance of maximizing Indian self-determination by removing the requirement that Indian housing comply with the HUD Minimum Property Standards in the absence of a waiver. Instead, the amendment required only that the design of Indian housing take into account the Minimum Property Standards, along with several other factors. 24 C.F.R. § 805.212(a) (1979). Thus, at the end of the period during which the housing in question was built, HUD was loosening, not tightening, the reins on the autonomy of Indian housing authorities that were receiving block grants.

By the time Plaintiffs filed their complaint in 2002, a new statutory regime was in effect under which Plaintiffs claim a federal trust obligation to repair or replace their houses.[9] In 1996, Congress enacted the Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 4101-4243. As the 1996 statute's statement of congressional findings recognized, federal Indian housing assistance was to be provided "in a manner that recognizes the right of Indian self-determination and tribal self-governance" and with the "goals of economic self-sufficiency and self-determination for tribes and their members." 25 U.S.C. § 4101(6)-(7).

Under NAHASDA, HUD makes annual block grants, in amounts determined by a formula, to a tribe or its designated

[9]In 1988, Congress moved the authorization for Indian low-income housing to Title II of the United States Housing Act and formalized the Indian housing program. Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 ("NAHASDA"). The 1988 statute did not govern at the time the Blackfeet housing was built, nor does it govern presently. For our purposes, the 1988 statute does not affect the analysis.

housing entity (such as an Indian housing authority), to carry out activities related to the provision of affordable housing. 25 U.S.C. §§ 4111(a), 4152; 24 C.F.R. §§ 1000.201, 1000.202, 1000.206, 1000.301-.340. To receive a block grant, a tribe must submit to HUD an Indian Housing Plan that meets certain requirements and that is subject to HUD's approval. 25 U.S.C. § 4111(b); 24 C.F.R. § 1000.201. But the housing plan is to be "locally driven." 24 C.F.R. § 1000.220. And HUD's statutorily prescribed role—in addition, of course, to providing the block grants themselves—is generally confined to "a limited review of each Indian housing plan," and even then "only to the extent that [HUD] considers review is necessary." 25 U.S.C. § 4113(a)(1). The grant, once made, is subject to tribal control; the recipient, rather than HUD, is responsible for operating the housing program, including the continued maintenance of housing. 25 U.S.C. § 4133. HUD's responsibility consists primarily of oversight and audit, to ensure that federal funds are spent for the intended purpose. 24 C.F.R. § 1000.520.

[12] Ultimately, no statute ever required tribes to form housing authorities. No statute obliged Indian housing authorities, once formed, to seek federal funds. No statute committed the United States itself to construct houses on Indian lands or to manage or repair them. Indeed, the relevant regulations expressly imposed inspection duties on Indian housing authorities, independently of HUD, including any enforcement of warranties. 24 C.F.R. §§ 805.221(a), 805.417(a) (1977).

[13] No statute has imposed duties on the government to manage or maintain the property, as occurred in *Mitchell II*, nor has any HUD regulation done so. Unlike in *White Mountain Apache Tribe*, here no statute has declared that any of the property was to be held by the United States in trust, nor did the United States occupy or use any of the property. In the present case, there is plenary control of neither the money nor the property.

[14] Instead, this case most closely resembles *Navajo Nation*. Just as the Indian Mineral Leasing Act required Secretarial approval of leases, but did not oblige the Secretary to negotiate them, the United States Housing Act gave HUD a right of final inspection with respect to construction and design materials, 24 C.F.R. §§ 805.211-805.217 (1977), but did not oblige HUD to select them. Here, as there, the statute failed to include a federal managerial role. Here, as there, Congress expressed the aim of giving the lead role to an entity other than the government.

[15] Although we must take as true Plaintiffs' allegations that HUD in fact required the use of wooden foundations and that those foundations caused injury, the government did not enter into a trust relationship merely because HUD did not approve an alternative design. Although HUD's power to approve a design implies the power to reject a design as well, the Supreme Court made clear in *Mitchell I* and *Navajo Nation* that such oversight authority alone (whether exercised wisely or unwisely) cannot create the legal relationship that is a threshold requirement for Plaintiffs to recover on a trust theory. Even if HUD's actions in mandating certain construction materials and methods may have been arbitrary or capricious, those actions alone cannot alter the legal relationship between the parties.

[16] In summary, under the Housing Act, Indian housing authorities (such as the Blackfeet Housing Authority) applied to HUD for loans to enable *the housing authority* to develop low-income public housing designed to be sold to eligible members of the tribe. Under NAHASDA, block grants could be used *by the tribe* or its designated housing entity to repair or replace housing. As with any grant of federal funds, certain requirements had to be met to obtain and spend the funds. But the federal government held no property—land, houses, money, or anything else—in trust. The federal government did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms. The federal

government did not build, manage, or maintain any of the housing. For these reasons, we adhere to our earlier ruling that the district court properly dismissed Plaintiffs' claim that HUD violated a trust responsibility. *Marceau*, 455 F.3d at 983-85.

C. *Administrative Procedure Act*

[17] Plaintiffs allege that they are entitled to relief under the APA, 5 U.S.C. §§ 702-706. The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. When reviewing an APA claim, a court may only (1) "compel agency action unlawfully withheld or unreasonably delayed"; or (2) "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1)-(2)(A). "[C]entral to the analysis . . . is that the only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

[18] As our earlier opinion explained, *Marceau*, 455 F.3d at 985, a claim under the APA requires, among other things, that the claimant seek "relief other than money damages." *See also Bowen v. Massachusetts*, 487 U.S. 879, 895-902 (1988) (analyzing the meaning of "money damages" in 5 U.S.C. § 702). Examination of the relief that Plaintiffs seek does not stop at the parties' allegations. Instead, "the substance of the pleadings must prevail over their form." *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 361 (5th Cir. 1987); *see also Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (examining plaintiff's APA claims and concluding that the "claims are not 'for money damages' "). We must "discern the nature of the relief being sought and focus on the type of relief that will result from the action." *Amoco Prod. Co.*, 815 F.2d at 362.

[19] In this case, Plaintiffs request equitable and injunctive relief. Specifically, they seek a declaration that HUD has violated its legal obligations, and they seek equitable relief in the form of repairs (or, where necessary, rebuilding) of their homes.

[20] According to Plaintiffs, a judicial declaration that HUD approved the construction designs and materials in a manner that violated HUD regulations could be used as leverage with Congress to enact remedial legislation. In their alternative claim for injunctive relief, Plaintiffs ask that HUD simply "fix" the construction defects that allegedly caused the health problems suffered by some of the Blackfeet homeowners. On reconsideration, we conclude that Plaintiffs' claims for declaratory and injunctive relief thus are distinct from money damages.

[21] The district court erred in dismissing Plaintiffs' claims for declaratory and injunctive relief under the APA before allowing adequate development of the record. According to the Amended Complaint, HUD required the use of "materials and construction techniques which do not meet HUD's own standards or standards used in the industry generally." HUD was required to approve "all contracts in connection with the development of a Project, including contracts for work, materials, or equipment, or for architectural, engineering or legal services." *See* 24 C.F.R. § 805.211 (1977).[10] The regulations that were in effect when HUD approved the 153 Blackfeet homes in the late 1970s provided that housing materials had to meet minimum property standards. 24 C.F.R. § 805.212 (1979); *Indian Housing Handbook* §§ 3-19, 3-20. Those mini-

[10]We note that HUD approval of contracts was common to all HUD housing programs. *See* Indian Housing; final rule, 44 Fed. Reg. 64,204, 64,206 (Nov. 6, 1979) ("The requirement for HUD approval of development contracts is in accordance with the standard rule for the entire public housing program, Indian and non-Indian, and is not considered unduly restrictive.")

mum property standards permitted the use of chemically treated lumber in the foundations of single- and double-family dwellings. *See* 24 C.F.R. § 200.925 & pt. 200, subpt. S, app. (permitting "[w]ater borne preservatives[,] [l]ight petroleum solvent penta-solution [and] [v]olatile petroleum solvent penta-solution"); *see also Minimum Property Standards* Handbook app. E, pp. E-1 and E-2.

HUD's regulations neither permitted nor proscribed the particular chemicals (such as arsenic) that Plaintiffs allege caused the unsafe housing conditions. Because the case is before us on a motion to dismiss the Amended Complaint, the record is silent about whether arsenic-treated lumber was within industry standards at the time. The record is equally silent about whether Plaintiffs requested the use of different materials or methods and about whether HUD failed to comply with its own regulations. At this stage in the litigation, though, we must accept as true Plaintiffs' allegations that the construction materials and methods were substandard and that HUD improperly mandated the use of the wooden foundations at issue.

For a similar reason, the district court prematurely dismissed Plaintiffs' claim for injunctive relief. Under Count Two of the Amended Complaint, Plaintiffs allege that, for more than 15 years, they "repeatedly asked the Blackfeet Housing Authority and HUD to remedy the dangerous housing conditions." NAHASDA permits a tribal authority to seek block grants from HUD for "affordable housing authorities," *see* 25 U.S.C. § 4111, which include "operating assistance for housing previously developed or operated under a contract between the Secretary and Indian housing authority," *id.* § 4132(1). To the extent that Plaintiffs requested remedial measures under the repealed Indian Housing Act, HUD had to consider their requests and then exercise discretion. *See S. Utah Wilderness Alliance*, 542 U.S. at 64 (holding that a failure to act can be cognizable under the APA). In summary, Plaintiffs' allegations—that HUD arbitrarily and capriciously

declined to consider requests for remedial funds, as required by 24 C.F.R. § 905.270 before the Indian Housing Act's repeal and by 25 U.S.C. §§ 4111 and 4132(1) under NAHASDA—suffice to bring the claim for injunctive relief under the APA.

D. *Breach of Contract Claims*

We readopt our earlier opinion, *Marceau*, 455 F.3d at 986, concerning Plaintiffs' breach of contract claims against HUD. The district court lacked jurisdiction to hear those claims, so there remains nothing for us to review.

AFFIRMED in part; REVERSED in part and REMANDED. The parties shall bear their own costs on appeal.

PREGERSON, Circuit Judge, dissenting:

I concur in the majority's rulings on tribal immunity and the Administrative Procedure Act. I dissent with regard to the majority's analysis of federal trust responsibility, and write separately on that issue.

I. Factual Background[1]

Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440, HUD developed the Homeownership Program. HUD designed the Homeownership Program to meet the housing needs of low-income American Indian families. HUD entered into agreements called "Annual Contributions Contracts" with tribal housing authorities under which HUD agreed to provide a specified amount

[1]These facts, except as noted, are taken from Plaintiffs' complaint, which is presumed true for purposes of this Rule 12(b)(6) proceeding.

of money to fund projects undertaken by the housing authorities and pre-approved by HUD. *See* 24 C.F.R. § 805.102 (1979); *id.* § 805.206. After securing funding from HUD, a tribal housing authority would then contract with eligible American Indian families. *See id.* § 805.406. The program required families to contribute land, labor, or materials to the building of their house, *see id.* § 805.408, and after occupying the house, each family made monthly payments in an amount calibrated to their income, *see id.* § 805.416(a)(1)(ii). The homebuyers were responsible for maintenance of the house. *See id.* § 805.418(a).

Until 1988, when the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996), HUD operated the Homeownership Program under a series of regulations and its "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791, 793.

In 1977, the Blackfeet Tribe established a separate entity, the Blackfeet Housing Authority, as HUD regulations required. *See* 24 C.F.R. § 805.109(c) (1979) (requiring, as a prerequisite to receiving Homeownership Program funding, that tribes form a tribal housing authority). HUD published a model enabling ordinance, *reprinted in* 24 C.F.R. § 805, subpt. A, app. I (1979), which the Blackfeet Tribe adopted. The enabling ordinance charged the Blackfeet Housing Authority with "[a]lleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income" and "[r]emedying unsafe and [u]nsanitary housing conditions that are injurious to the public health, safety and morals." Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977). Thereafter, HUD granted the Housing Authority authorization and funding to build 153 homes.

Construction of the homes took place between 1979 and 1980. The homes, at least in retrospect, were not constructed

well. The homes were built with wood foundations, and the wood products used to build the foundations were chemically treated with arsenic and other toxic chemicals. Plaintiffs allege, as the crux of their claim, that HUD *required* the use of wood foundations over the objection of tribal members, and that the Housing Authority acceded to that directive.

In the ensuing years, the foundations were, predictably, vulnerable to moisture accumulation and structural instability. Today, some of the houses are uninhabitable due to toxic mold and dried sewage residues. There has been a high incidence of cancer, asthma, kidney failure, respiratory problems, and other serious health problems among residents of the homes. Many residents have been advised to leave their houses for health reasons. Some residents, however, cannot leave because there are, quite simply, no affordable housing options in the area.

Plaintiffs purchased or leased these Homeownership Program homes either directly or indirectly from the Housing Authority. They made significant monthly payments and investments of their own time and/or resources, as required under the Homeownership Program. After it became clear that the houses were substandard and hazardous, Plaintiffs sought assistance from the Blackfeet Housing Authority and from HUD in remedying the construction defects. When they received no assistance from either entity, Plaintiffs filed this class action complaint.

II. Analysis

A.

Plaintiffs allege that HUD has violated its trust responsibility to tribal members.[2] The federal government has substantial

[2]Count Three of Plaintiffs' original complaint alleged that HUD has violated: (a) the United States Housing Act of 1937, 42 U.S.C. §§ 1437-

trust responsibilities toward Indians. These duties are part of the nature of the government-Indian relationship. "[A] fiduciary relationship necessarily arises when the Government assumes . . . elaborate control over forests and property belonging to Indians." *United States v. Mitchell*, ("*Mitchell* II"), 463 U.S. 206, 225 (1983).

1. Historical Framework

The federal government-Indian trust relationship dates back over a century. To appreciate the nature and extent of the government's responsibilities, and its failure to discharge them, I review the history of the government-Indian trust relationship.

The United States' relationship with the Indian tribes has almost always been "contentious and tragic." *Cobell v. Norton*, 240 F.3d 1081, 1087 (D.C. Cir. 2001). In the early days of this nation, the federal government sought to put an end to the communal living and nomadic life common to so many tribes. The government (by treaty and/or by force) moved Indians onto reservations. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

In the second half of the nineteenth century, the government replaced its policy of relocation with one of assimilation. This assimilationist policy began with treaties negotiated with individual tribes, and was eventually enacted into federal law with passage of the General Allotment Act of 1887, also known as the "Dawes Act," ch. 119, 24 Stat. 388 (as amended at 25 U.S.C. § 331 et seq.). Under the General Allotment Act,

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1437x; (b) the Indian Housing Act, 42 U.S.C. §§ 1437aa-1437ee; (c) the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243; and (d) the Housing Act of 1949, 42 U.S.C. §§ 1441-1490. On appeal, Plaintiffs did not challenge the district court's holding that no express or implied right of action existed under those statutes. Accordingly, I do not consider those statutes here.

beneficial title of the lands allotted to tribes vested in the United States as trustee for individual Indians.[3]

The government then began to divide reservations and other Indian lands into individual parcels. The government essentially took the land it had earlier set aside for Indian tribes and re-allotted the land to individual tribe members. *See* Felix S. Cohen, Handbook of Federal Indian Law § 1.04 (2005 ed.). "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large." *Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254,(1992). Once tribal lands were allotted in fee to individual tribal members, white settlers could purchase the lands from tribe members.

The federal government ceased allotting tribal lands to individuals with the enactment of the Indian Reorganization Act of 1934 ("IRA"), 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 et seq.). Lands already allotted remained so, but the IRA provided that unallotted Indian lands would be returned to tribal ownership. 25 U.S.C. § 463.

In the 1950s, federal Indian policy shifted yet again as Congress adopted a "termination policy." Under termination, Congress sought to release tribes from federal supervision and to terminate the government-Indian relationship. The purpose of this policy shift was specifically to sever the trust relationship. *Cobell*, 240 F.3d at 1088. During this period, Congress terminated numbers of tribes and withdrew its recognition of those tribes.

The termination policy was no more successful than earlier assimilation efforts, and was soon replaced with the current policy of self-determination and self-governance. In 1975

[3]Where tribes resisted allotment, it could be imposed. *See* Act of June 28, 1898, ch. 517, 30 Stat. 495 ("Curtis Act").

Congress enacted the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975). Today, much tribally owned land is held in trust "indefinitely." 25 U.S.C. § 462.

2. *The Mitchell Doctrine*

Here, Plaintiffs argue that, as tribal members, HUD owed them a trust duty and it breached that duty. Claims based on the tribal trust duty are enforceable via the Tucker Act. In 1980, the Supreme Court held that the General Allotment Act, on its own, did not provide a substantive damage remedy enforceable through the Tucker Act. *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 541-46 (1980).

The tribe in *Mitchell I* protested federal mismanagement of its timber resources. Although acknowledging that the General Allotment Act did indeed establish a trust relationship on behalf of the Indians, the Court found the relationship to be a "limited" one that did not impose a duty to manage timber resources. *Id.* at 542. Under the Court's reading of the General Allotment Act, the trust responsibilities of the federal government under the statute were merely to prevent alienation of the land and to hold the land "immune from . . . state taxation." *Id.* at 544.

Although the *Mitchell I* Court rejected the tribe's claim as premised solely on the General Allotment Act, it remanded to the Court of Claims for consideration of whether other statutes might provide a basis for liability. *Id.* at 546. Thus, the Court left the door open to continued pursuit of the claim against the federal government under alternative sources of law.

When the case returned to it, the Supreme Court permitted the Tucker Act suit to proceed. *Mitchell II*, 463 U.S. 206. The Court examined various timber management statutes enacted subsequent to the General Allotment Act, which directed the

government to manage Indian forest resources, obtain revenue thereby, and pay proceeds to the landowners. *Id.* at 219-24. The Court held that these statutes imposed strict duties upon the government to manage forestlands and specifically required the government to take into account the maintenance of the productive use of the land, the highest and best use of the land, and the financial needs of the owner and the owner's heirs. *Id.* The Court held that the statutes confirmed the existence of a fiduciary relationship, especially given the pervasive and complete control exercised by the government over these lands. *Id.*

Finally, in *Mitchell II* the Court concluded that because this fiduciary relationship specifically prescribed management of Indian timber resources, these statutes could fairly be interpreted as mandating the payment of money — thereby satisfying the standard for a Tucker Act action. *Id.* at 224-27. Moreover, the Court stated, absent a damages remedy, the fiduciary obligations of the United States would be largely unenforceable, because prospective relief would be inadequate and fail to deter federal officials from defaulting in their trust duties. *Id.* at 227-28.

Together, *Mitchell I* and *II* form the *Mitchell* doctrine, which outlines the circumstances under which the federal government owes a fiduciary duty to tribes. These cases indicate that the government's obligation must go beyond the mere general obligation that it owes to domestic dependent sovereigns. A tribe must demonstrate specific statutory language indicating that the federal government has pervasive control over the resource at issue. Two decisions from 2003 clarify the *Mitchell* doctrine: *United States v. Navajo Nation*, 537 U.S. 488 (2003), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

In 1964, the Navajo Nation, with the approval of the Secretary of the Interior, entered into a lease with the corporate predecessor of the Peabody Coal Company for coal mining on

tribal lands. *Navajo Nation v. United States*, 46 Fed. Cl. 217, 221 (Ct. Cl. 2000). The lease provided for low initial royalty payments to the tribe. *Id.* Pursuant to the terms of the lease, the tribe and the mining company agreed to delegate power to the Secretary of the Interior to adjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. *Id.* By the 1980s, the royalty payments to the Navajo Nation were only about two percent of gross proceeds on the coal, well below the twelve-and-a-half percent Congress had established for coal mined on federal lands. *Navajo Nation*, 537 U.S. at 496.

Subsequently, the Navajo Nation and the Peabody Mining Company negotiated a change in the royalty rate to twelve-and-a-half percent, retroactive to 1984, and included other concessions such as coal company acceptance of tribal taxation of coal production. *Id.* at 498. In 1987, after the Navajo Tribal Council approved the lease amendments and a final agreement was signed, Interior Secretary Hodel approved the negotiated agreement. *Id.* at 500. The tribe later learned that Secretary Hodel had engaged in backroom ex parte dealings with the coal company, without which the royalty rate would likely have been closer to twenty percent (not the twelve-and-a-half percent negotiated).

In 1993, the Navajo Nation filed suit in the Court of Federal Claims under both the Tucker Act and the Indian Tucker Act, claiming that the Secretary of the Interior breached the government's trust obligations by approving the 1987 amendments to the lease. *Navajo Nation*, 46 Fed. Cl. at 220-21. The tribe contended that the Indian Mineral Leasing Act imposed a fiduciary obligation on the Secretary of the Interior to maximize the financial returns from coal leases and that the twelve-and-a-half percent royalty rate approved in 1987 was manifestly inadequate. *Id.* at 219-21.

In *Navajo Nation*, the Supreme Court confirmed the continued primacy of *Mitchell I* and *Mitchell II* as "the pathmarking

precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government.' " 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218). The Court explained the contrast between *Mitchell I* and *Mitchell II* as that between a "bare trust" for limited purposes and "full responsibility" by the government for management of Indian resources. *Id.* at 505 (quoting *Mitchell II*, 463 U.S. at 224). The Court held that the statutory "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* at 506. However, once such a full fiduciary duty has been identified in the pertinent statute, the Court said that the availability of damages as a remedy "may be inferred," even if not expressly referred to in the statute. *Id.*

Turning to the Indian Mineral Leasing Act, the *Navajo Nation* Court ruled, "[t]he IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective and [further] authorizes the Secretary generally to promulgate regulations governing mining operations." *Id.* at 507. The statute, by failing to include a federal managerial role, did not establish the "limited trust relationship" needed to support a claim for relief. *Id.* at 507-08.

Further, the Court explained that "imposing fiduciary duties on the Government here would be out of line with one of the statute's principal purposes." *Id.* at 508. Because "[t]he IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties," the congressional purpose would be defeated by "[i]mposing upon the Government a fiduciary duty to oversee the management of allotted lands." *Id.*

In an opinion issued the same day as *Navajo Nation*, the Supreme Court examined the trust doctrine in the context of overseeing the maintenance of buildings on land of the White

Mountain Apache Tribe. *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

In 1870, the United States Army established Fort Apache in the White Mountains of east-central Arizona. *White Mountain Apache Tribe v. United States*, 46 Fed. Cl. 20, 22 (1999). In the 1920s, control of the fort was transferred to the Department of the Interior, and part of the property was used as a school. *Id.* In 1960, Congress declared that Fort Apache "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8, 8 (1960). In 1976, the National Park Service designated Fort Apache as a National Historic Site. *White Mountain Apache Tribe*, 46 Fed. Cl. at 22.

As alleged by the tribe, the Secretary of the Interior exercised the statutory prerogative to use the property, but then allowed Fort Apache to fall into disrepair and failed to perform necessary maintenance. *Id.* The tribe commissioned an engineering assessment of the property. The assessment reported that it would cost roughly $14 million to rehabilitate the property in accordance with standards for historic preservation. *White Mountain Apache Tribe*, 537 U.S. at 469. The tribe brought suit in the Court of Claims arguing that the government had breached its fiduciary duty.

The Supreme Court held there to be an actionable fiduciary relationship. *Id.* at 468. In light of the *Mitchell* cases, the Court concluded that the Fort Apache trust statute "goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach." *Id.* at 474. First, the 1960 Act "expressly defines a fiduciary relationship" by providing that Fort Apache be "held by the United States in trust for the White Mountain Apache Tribe." *Id.* (citing statute). Second, the United States

exercised its discretionary authority to make actual use of the property, thus "not merely exercis[ing] daily supervision but . . . enjoy[ing] daily occupation." *Id.* at 475.

Accordingly, the Court held when the government assumes plenary control over assets held in trust, the government likewise assumes an obligation as trustee to preserve those assets, even absent express statutory delineation of duties of management and conservation. *Id.* As the Court observed, "elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch." *Id.* The Court explained that a trust relationship between the United States and Native Americans alone is not enough to imply a remedy in damages, and thus "a further source of law [is] needed to provide focus for the trust relationship." *Id.* at 477. But "once that focus [is] provided, general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." *Id.*

The *Mitchell* cases, *Navajo Nation*, and *White Mountain Apache* together define the state of law with respect to the Indian trust doctrine. These cases stand for the proposition that tribes may successfully bring cases before the Court of Federal Claims seeking money damages based on the government's breach of a fiduciary duty. Hence, the trust doctrine gives rise to a viable Tucker Act claim. *See* George C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money and Sovereign Immunity* 29 Tulsa L. Rev. 313, 317 (2003) (summarizing these important cases and discussing their interplay with the Tucker Act and the Indian Tucker Act).

Before the Court decided these cases, tribes and tribal members had to identify specific statutes stating a right to monetary relief from the government. *Id.* at 337. With these four cases, the Court has clarified that the trust relationship itself can establish a right to monetary relief. However, plaintiffs must go beyond asserting the general trust relationship

between tribes and the government, and must allege a specific trust obligation tied to the resource at stake. In *Mitchell II*, the Court recognized that statutes established a pervasive federal regulation over timber resources adequate to demonstrate a trust relationship. In *White Mountain Apache*, the Court held that the federal government's occupation and management of land and buildings established a trust relationship. These cases demonstrate that where statutes and behavior create pervasive governmental control over a tribal resource, a specific trust relationship and concomitant fiduciary duty are created.

In *Navajo Nation*, the Court examined the Interior Department's control over mining resources and found no pervasive control. There, the Court held that the statutory framework only established a minor role for the federal government — signing and approving mining leases that were negotiated and managed by the tribes. The Court found it particularly significant that the statute regarding the leases was designed to keep control of the resource in the hands of the tribe. In the wake of these cases, determining whether there is a trust relationship sufficiently detailed to create a viable claim under the Tucker Act requires a tailored inquiry into the resource at stake, the role of the federal agency involved, and the attendant statutory structure.

3. Housing on the Blackfeet Reservation

In assessing whether plaintiffs have a potential claim under the tribal trust doctrine, we examine the level of control the federal government exercises over the tribal asset at issue. Here, the asset is housing. The federal government's pervasive control of housing on the Blackfeet reservation relates directly to the trust obligations the government owed the tribe.

Congress's decision to hold tribal land in trust has the practical result of eliminating the private housing market on tribal land because neither individual members of the tribe nor the tribe itself has an ownership interest that can be used as secur-

ity. The government's decision to hold tribal land in trust shows Congress' intent to maintain pervasive control over the resource at stake and gives rise to a fiduciary duty in the government-created tribal housing market. However admirable the government's motivations, the decision to take tribal land in trust has had adverse consequences: by holding tribal land in trust and preventing alienation, the federal government foreclosed many options that exist in most private housing markets. In a recent publication, the United States Commission on Civil Rights reported that American Indians have consistently found it difficult to obtain mortgages on their land because the land is held in trust and therefore cannot be used as collateral. *See* United States Comm. on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country at 64, *available at* http://www.usccr.gov/pubs/na0703/na0731.pdf; *see also* H.R. Rep. 100-604, reprinted in 1988 U.S.C.C.A.N. 791, 795.

Similarly, private housing developers have been deterred from entering tribal housing markets because the property cannot be alienated. *Id.* at 64. The federal government exercises pervasive control over tribal land, and in so doing, severely limits the tribe's ability to control its own economic development in the area of housing. In fact, according to one House Report relating to the passage of the Indian Housing Act, HUD's Homeownership Program was the "only reasonable source of housing in many reservations," see H.R. Rep. 100-604, reprinted in 1988 U.S.C.C.A.N. 791, 795, in part because the land was held in trust.

Thus, while the goal of the General Allotment Act was to prevent unwise tribal alienation of the land, the result was to prevent building and improving housing. Restrictions operating on Indian lands prevent developers from entering the private tribal housing market, and leave tribes with no option but to wait for the federal government to provide decent, safe, and sanitary housing.

The government has often undertaken to provide tribal housing as an exercise of its special responsibility to the tribes. Congress has acknowledged federal control over tribal land and the government's attendant obligations. Congress has specifically noted that the federal government's general trust relationship with the tribes creates a responsibility for the federal government to remedy the deplorable housing conditions on reservations. *See* Native American Housing Assistance and Self-Determination Act ("NAHASDA"), 25 U.S.C. § 4101(2)-(5). NAHASDA recognizes that:

> Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition; . . . [Moreover,] *providing affordable homes in safe and healthy environments is an essential element in the special role of the United States* in helping tribes and their members to improve their housing conditions and socioeconomic status.

25 U.S.C. § 4101(4)-(5) (emphasis added).

As indicated in the findings under NAHASDA, the federal government's duty to remedy tribal housing conditions existed even before NAHASDA — it derives from treaties and the "general course of dealing" with tribes. During the process of forcing the tribes onto reservations, many tribes were explicitly promised housing in exchange for land cession. *See* Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. BlackLetter L.J. 211, 215-23 (2002). Others were promised money to "promote their civilization." *Id.* at 218-19; *see, e.g., White Mountain Apache Tribe v. United States*, 26 Cl.Ct. 446, 465, 466-67 (1992). The Blackfeet Tribe signed

such a treaty. The Court of Claims has held that treaty language such as the "requisites to 'promote civilization' " includes housing. *White Mountain Apache*, 26 Cl. Ct. at 466-67. Treaty language and the relationship between the tribes and the federal government demonstrate that the federal government has long promised that it would assist American Indian tribes in providing housing.

When tribal land was taken into trust under the General Allotment Act, it was done to ensure that every Indian could have a "homestead of his own with assistance by the government to build houses and fences, and open farms." *See* Davis, 18 Harv. BlackLetter L.J. at 224 (quoting Comm'r of Indian Affairs, Annual Report iv-v (1885)). Henry Dawes, proponent of the General Allotment Act, stated that housing was a central element of the Act. *Id.* at 224. When the government took the land in trust, it committed itself to play a major role in housing the trust land's occupants.

Navajo Nation and *White Mountain Apache* delineate the ends of a continuum along which courts examine the *Mitchell* doctrine. In *White Mountain Apache*, the federal government's involvement was pervasive. The federal government occupied the land, built and maintained structures on the land, and managed the land. Additionally, federal legislation explicitly recognized a trust relationship between the government and the tribe with respect to management of the land. When the federal agency allowed the buildings on the land to fall into dangerous disrepair, the Court held that it had a fiduciary obligation regarding the buildings and the land. The obligations surrounding the buildings had also been heightened by the National Park Service's designation of the area as a National Historic Site. Thus, the case demonstrates on-site involvement, oversight of the building and management of the structure, funding, and a statutory framework explicitly recognizing the trust relationship.

The present case is similar in several respects. The federal government controlled the design of the houses, set the build-

ing standards, approved all the designs and contracts, and provided funding. HUD's control of housing on tribal land and the Homeownership Program was pervasive.

HUD set the "prototype costs" for each locality, and required that the cost of construction and equipment could not exceed the prototype cost by more than ten percent. *See* Department of Housing and Urban Development, Manual 7440.1: Indian Housing Handbook 3-29 (March 1976). These prototype costs were based on the minimum property standards, standards that permitted the use of the wood foundations at issue here. Housing authorities proposed projects within the prototype cost, "carefully consider[ing] costs . . . to be sure that the project is completed at the lowest possible cost." Indian Housing Handbook 3-40. Even then, however, HUD approved the "development cost" allocated for each project. Indian Housing Handbook 3-40; 5-25. Any variation from the minimum property standards had to be HUD-approved. Indian Housing Handbook 5-25. HUD also had final say over design of the houses and the authority to alter tribally proposed designs in any way. The Indian Housing Handbook has a sample of every form, every contract, every checklist to be used from the first step to the last.

Thus, the only autonomy permitted to tribal housing authorities was the right to design a home within the price range set by HUD, a price range based on HUD's minimum property standards. Even then HUD could change the plans. This is hardly "maximum responsibility for project administration" promised to the Housing Authority by HUD. *See* HUD Housing Manual 2-1.

The facts of this case confirm that the tribe had little control over how HUD housing would be built. Although the Blackfeet Housing Authority and occupants of the housing vigorously opposed use of wood foundations, it appears that they had no power to control the materials used. Thus, not only was HUD funding the only viable lending option on

most tribal property, but it exerted almost total control over how the tribes would use the housing money they received to construct homes on land the government held in trust.

Thus, as with *Mitchell II*, there is pervasive management of a tribally owned resource to the exclusion of control by the tribal landholders. And, unlike *Mitchell I*, the very purpose for which the land was taken in trust — to prevent alienation — caused the injury at issue. Just as in *Mitchell II*, tribes were squeezed out of any role in their own tribal housing market.

The current case contrasts with the minimal federal control at issue in *Navajo Nation*. There, the Interior Department's only role was to approve leases. It did not manage the leases, negotiate the leases, or dictate their terms. The Interior Department did not provide any funding or oversight beyond lease approval. Although the Interior Secretary appeared to have conducted himself improperly by revealing confidential information to the mineral lessee, the Court held that there was no fiduciary duty and no trust asset in connection with the mineral leases. *Navajo Nation* represents minimal involvement, and it stands in sharp contrast to the pervasive regulation of housing on the Blackfeet reservation. The framework in this case is more akin to the system in *White Mountain Apache*.

An important element in both *Navajo Nation* and *White Mountain Apache* (and in the *Mitchell* cases) was the statutory framework regarding the resource in question. In *White Mountain Apache*, statutory language used the word "trust" when acknowledging the obligation the government owed the tribe in relation to management of tribal land. In *Navajo Nation*, the statutory framework gave the tribe management of the resource. In *Mitchell II*, the Court examined several timber management statutes and noted that the statutory framework showed evidence of an intent by the federal government to pervasively control the tribe's timber resources. Based on the importance of statutory framework in a tribal trust analy-

sis, the determining factor in the present analysis lies in the housing statutes that resulted in the construction of the substandard homes.

The homeowners base their trust claims on five statutes: the United States Housing Act of 1937 and 1949, 42 U.S.C. § 1437-1437x; the National Housing Act, 12 U.S.C. §§ 1715l(a), 1738(a); the Indian Housing Act of 1988, 42 U.S.C. § 1437aa-ff; and the Native American Housing and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. §§ 1702-1750.

At the time the houses were constructed for low-income families on the Blackfeet Indian Reservation in the 1970s, there was no specific statutory enactment applicable only to public housing on Indian lands. Federal low-income housing legislation was generally found in the U.S. Housing Act. *See* 42 U.S.C. §§ 1437-1437j (1976). The provisions in the U.S. Housing Act applied to all public housing, including housing on Indian reservations. *See* 42 U.S.C. § 1437a(6)-(7) (1976) (defining "public housing agency" to include entities "authorized" by, among other governmental agencies, "Indian tribes" to "engage in or assist in the development or operation of low-income housing").

Through the Housing Act, Congress appropriated money for low-income housing purposes, *see* 42 U.S.C. § 1437g(c), and authorized and directed the Secretary of HUD to award, or lend, any appropriated funds to eligible grantees, *see* 42 U.S.C. §§ 1437b, 1437c, 1437f, 1437g(a), & 1439(d). Local housing authorities could apply for loans and grants for the "development, acquisition, or operation of low-income housing projects." *See* 42 U.S.C. §§ 1437b, 1437c, 1437d(a), 1437g. Under the Housing Act, HUD could award funding and other benefits to tribal housing authorities. *See, e.g.*, 24 C.F.R. §§ 805.108-805.109 (1976) (relating to Indian housing authorities).

HUD implemented, by regulation, a "Mutual Help Homeownership Opportunity Program" on Indian lands to help meet the needs of low-income Indian families. The homes currently at issue were built under this regulatory program. Housing authorities could sell public housing to low-income families under "such terms and conditions as [HUD] may determine by regulation." 42 U.S.C. § 1437c(h) (1976). Under the Homeownership Program, an Indian housing authority could apply to HUD for loans to enable the housing authority to develop public housing designed for sale to eligible tribal members. *See* 24 C.F.R. §§ 805.404(a), 805.415, 805.416, 805.421, 805.422 (1976).

In 1988, nearly ten years after the Blackfeet low-income homes were completed, Congress enacted the Indian Housing Act. The Indian Housing Act was specific Indian housing legislation that moved all Indian public housing programs to a separate title of the U.S. Housing Act and provided express statutory authority for the Homeownership Program under 42 U.S.C. § 1437bb (1988). With the subsequent adoption of the NAHASDA in 1996, Congress moved Indian housing programs out of the U.S. Housing Act consolidating the programs under NAHASDA. HUD's involvement with Indian public housing programs is now controlled exclusively by the NAHASDA and its implementing regulations. Housing Authorities receive block grants under the NAHASDA, and HUD administers the grants. *See Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1195 (2002).

On their face, these statutes only establish a mechanism for lending money to tribal housing authorities. However, a review of the statutory framework and the Homeownership Program reveals a much more pervasive and controlling framework, as detailed above. The Homeownership Program details the requirements for the housing and connected contracts. There is no language indicating that the goal of the Homeownership Program is merely to help Indian tribes in managing their land and resources. The regulations do not

defer to tribal authorities or tribal decision making, but instead explicitly detail what the tribal authorities are to do each step of the way. Federal control over the funds and the program is pervasive.

But pervasive control over a tribal housing program is not necessarily the same as federal control over the tribal resource. If the tribe chooses not to participate in this program (and therefore not receive the funding for housing), HUD has no input into the housing contracts, house designs, or materials used. Such a view, however, ignores the overarching housing issue. The federal government undertook, as part of its treaty and general trust relationship, to assist the Blackfeet tribe to acquire decent, safe, and sanitary housing for low-income families. The tribe had little choice but to accept the government housing program. HUD's Homeownership Program was the "only reasonable source of housing in many reservations," *see* H.R. Rep. 100-604, *reprinted in* 1988 U.S.C.C.A.N. 791, 795, and this was the case on the Blackfeet Reservation. Here, the federal government actively undertook to assist the Blackfeet to obtain desperately needed decent, safe, and sanitary housing. Labeling the housing program as simply one of "financing" ignores the fact that private lenders would not finance the construction of homes on reservation land held by the federal government, which actively undertook to assist the Blackfeet to obtain desperately needed decent, safe, and sanitary housing.

Because the government undertook to fulfill its trust responsibility to provide housing for the tribe and did so through a pervasive regulatory structure, I would hold that the federal government, having undertaken this task, had an obligation to perform it in a manner consistent with its fiduciary duty to the tribe. Based on the facts set forth in the Complaint, I believe that the government breached that duty by requiring the tribes to use substandard, hazardous building materials during the construction of the homes and then refusing to

repair or rebuild the homes. Accordingly, I concur in part, dissent in part.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARTIN MARCEAU; CANDICE LAMOTT; JULIE RATTLER; JOSEPH RATTLER, JR.; JOHN G. EDWARDS; MARY J. GRANT; GRAY GRANT; DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

BLACKFEET HOUSING AUTHORITY, and its board members; SANDRA CALFBOSSRIBS; NEVA RUNNING WOLF; KELLY EDWARDS; URSULA SPOTTED BEAR; MELVIN MARTINEZ, Secretary; DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, United States of America,

Defendants-Appellees.

No. 04-35210

D.C. No. CV-02-00073-SEH

OPINION

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Argued and Submitted
June 16, 2005—Seattle, Washington

Filed July 21, 2006

Before: Harry Pregerson, Susan P. Graber, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Pregerson;
Concurrence by Judge Pregerson

SUMMARY

Government Law/Native Americans

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that a tribe waived the immunity of a tribal housing authority when it enacted an enabling ordinance with a "sue and be sued" clause, subject to the limitations contained in the enabling ordinance.

Appellants, members of the Blackfeet Indian tribe in Montana who purchased or leased substandard and possibly hazardous homes built under the auspices of the federal Mutual Help and Homeownership Program (MHHO Program), filed a class action complaint in district court in Montana against appellees including the Department of Housing and Urban Development (HUD) and the Blackfeet Tribal Housing Authority and its board members, alleging that they violated statutory, contractual, and fiduciary duties owed to them. The homes were built with wood foundations, using wood pressure-treated with arsenic and other toxic chemicals. The homeowners alleged that this caused their homes to deteriorate, and that the present condition of the homes caused severe health problems for the homes' residents. The homeowners claimed that a "sue and be sued" clause in the enabling ordinance that created the Blackfeet Housing Authority was a clear waiver of tribal immunity. The "sue and be sued" clause expressly permitted suit on any contract, claim or obligation arising out of its activities; the enabling ordinance limited only the funds out of which a judgment against the housing authority could be satisfied. The homeowners made claims against HUD based on violations of the trust responsibility, the Administrative Procedure Act (APA), and breach of contract. HUD moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The housing

authority moved to dismiss based on tribal immunity. The district court granted both parties' motions to dismiss.

The homeowners appealed.

[1] An Indian tribe enjoys sovereign immunity from suit except where Congress authorizes the suit or the tribe waives its immunity. Tribal immunity has generally been held to apply to housing authorities formed by tribes. Thus there was little doubt that the Blackfeet Tribe's sovereign immunity extended to the Blackfeet Housing Authority and to the members of the Blackfeet Housing Authority's board. [2] Congressional abrogation of tribal immunity cannot be implied but must be unequivocally expressed. Similarly, a tribe may voluntarily subject itself to suit by issuing a "clear" waiver.

[3] The federal courts have had frequent occasion to interpret the "sue and be sued" clause in the Blackfeet Housing Authority's enabling ordinance. The text was proposed in HUD's model enabling ordinance, and is repeated in the enabling ordinance of many tribal housing authorities. [4] Two main lines of cases have emerged. First, there is a line of cases stating that the very existence of a "sue and be sued clause" waives the tribal immunity of housing authorities. [5] Another line of cases has held that the "sue and be sued" clause alone did not waive tribal immunity. [6] Independent of the precedent on both sides, the "sue and be sued" clause expressly permitted suit on any contract, claim or obligation arising out of its activities. This wording foreclosed the argument that some further waiver had to be obtained by a later contract; such a holding would render "claim or obligation" as surplusage. [7] Second, interpreting the "sue and be sued" clause as sufficient to waive the housing authority's immunity allowed the court of appeals to interpret the entire section consistently. [8] Third, the enabling ordinance clearly countenanced that the housing authority would be subject to a judgment against it, and limited only the funds out of which such a judgment could be satisfied. [9] Thus, a plain reading of the

Blackfeet Housing Authority's enabling ordinance supported the homeowners' argument that the housing authority intended to waive its immunity when it enacted the enabling ordinance.

[10] The context in which such housing authorities were created also informed the interpretation the court of appeals gave the clauses. **[11]** Under Section 17 of the Indian Reorganization Act, tribes were also permitted to form corporate organizations—business corporations through which they could enter the world of commerce. Housing authorities are Section 17 organizations. **[12]** Because developers and lenders would be reluctant to deal with a corporation that is legally irresponsible and cannot be made to answer for its debts, tribes can compete fully in the business world only if they voluntarily agree to limit their right to immunity. **[13]** It had to be held that the tribe waived the immunity of the housing authority when it enacted the enabling ordinance with its "sue and be sued" clause, subject to the limitations contained in the enabling ordinance. Because a sovereign is entitled to set the terms on which it waives its immunity, such limits restricted the ability of the homeowners to collect damages against the housing authority. The homeowners' claims against the housing authority had to be remanded to the district court for further proceedings.

[14] Where the government takes full control of a tribally owned resource and manages it to the exclusion of the tribe, a fiduciary relationship is created and the government bears responsibilities as a fiduciary. **[15]** Because the homeowners did not show that HUD took a pervasive role in the management of a tribal resource, it had to be held that no fiduciary duty existed.

[16] The APA grants a cause of action to persons injured by administrative action. A claim under the APA requires, among other things, that the claimant seeks relief other than money damages. **[17]** Money damages in an amount neces-

sary to repair or rebuild the homeowners' homes would be a sufficient remedy, and, therefore, an injunction was not an available remedy. Because the homeowners had no remedy apart from legal damages, a claim under the APA was not appropriate.

[18] The Tucker Act vests the Court of Federal Claims with exclusive jurisdiction for contract claims against the United States. The Little Tucker Act carves out a minor exception, creating concurrent jurisdiction in the district courts for contract claims against the United States not exceeding $10,000. While parties may waive their right to receive more than $10,000, the homeowners did not do so. Thus, given that the homeowners sought monetary damages in excess of $10,000, the district court correctly determined that it was without jurisdiction to hear their contract claims against HUD. The judgment of the district court had to be affirmed on these issues.

Judge Pregerson concurred specially, writing that the United States' responsibility to the Blackfeet Tribe and its members was deeper than a legal responsibility; it was also a moral responsibility; the federal government should recognize the consequences of its actions and come to the assistance of the people who will otherwise continue to live in absolute squalor.

COUNSEL

Jeff Simkovic, (argued and briefed), Billings, Montana, Thomas E. Towe, (briefed), Towe, Ball, Enright, Mackey & Sommerfeld, Billings, Montana, and Mary Ann Sutton (argued and briefed), Missoula, Montana, for the plaintiffs-appellants.

Timothy J. Cavan, Assistant United States Attorney, Department of HUD, Billings, Montana, Stephen A. Doherty for

Blackfeet Housing, Great Falls, Montana, and Harold J. Rennett for Government, Washington, D.C., for the defendants-appellees.

OPINION

PREGERSON, Circuit Judge:

Plaintiffs represent members of the Blackfeet Indian tribe who purchased or leased homes built under the auspices of the Department of Housing and Urban Development ("HUD") Mutual Help and Homeownership Program ("MHHO Program"). Plaintiffs' homes were built with wood foundations, using wood pressure-treated with arsenic and other toxic chemicals. Plaintiffs allege that this use of wood foundations caused their homes to deteriorate, and that the present condition of the homes has caused and continues to cause severe health problems for the homes' residents. They sued both HUD and the Blackfeet Tribal Housing Authority ("Housing Authority") and its board members alleging numerous statutory and contractual violations. We have jurisdiction under 28 U.S.C. § 1291, with the limitations discussed below. We reverse the district court's dismissal of the claims against the Housing Authority, and affirm dismissal of the claims against HUD.

I. Factual Background[1]

Pursuant to the goals set out in the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1440 (2005), HUD developed the MHHO Program. The MHHO Program was designed to

[1]These facts, except as noted, are taken from Plaintiffs' complaint, which is presumed true for purposes of this Rule 12(b)(6) proceeding. For a more vivid description of the Plaintiffs' plight, see Jessie McQuillan, *Rotten Deal*, Missoula Indep., April 6, 2006, *available at* http://www.missoulanews.com/News/News.asp?no=5625.

meet the housing needs of low-income American Indian families. HUD entered into agreements called "Annual Contributions Contracts" with tribal housing authorities under which HUD agreed to provide a specified amount of money to fund projects undertaken by the housing authorities and preapproved by HUD. *See* 24 C.F.R. § 805.102 (1979); *id.* § 805.206. After securing funding from HUD, the Housing Authority, in turn, would contract with eligible American Indian families. *See id.* § 805.406. The families were required to contribute land, labor, or materials to the building of their house, *see id.* § 805.408, and after occupying the house, each family was required to make monthly payments in an amount calibrated to their income, *see id.* § 805.416(a)(1)(ii). The homebuyers were made responsible for maintenance of the house. *See id.* § 805.418(a). Until 1988, when the program was formalized in the Indian Housing Act of 1988, 42 U.S.C. §§ 1437aa-1437ee (1988), *repealed by* Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, 110 Stat. 4016 (1996), HUD operated the MHHO Program under a series of regulations and its own "Indian Housing Handbook." *See* H.R. Rep. No. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791, 793.

In 1977, the Blackfeet Tribe established a separate entity, the Blackfeet Housing Authority, as required by HUD's regulations. *See* 24 C.F.R. § 805.109(c) (1979) (requiring, as a prerequisite to receiving MHHO funding, that tribes form a tribal housing authority). The Blackfeet Tribe adopted HUD's model enabling ordinance, *reprinted in* 24 C.F.R. § 805, subpt. A, app. I (1979).[2] In the enabling ordinance, the Blackfeet Housing Authority was charged with "[a]lleviating the acute shortage of decent, safe and sanitary dwellings for persons of low income" and "[r]emedying unsafe and

[2]The Board of the Blackfeet Housing Authority has since been disbanded, and the entity is now simply an arm of the tribal government called "Blackfeet Housing." This fact makes no difference to our analysis, and we use "Housing Authority" to refer to this entity in both its iterations.

[u]nsanitary housing conditions that are injurious to the public health, safety and morals." Blackfeet Tribal Ordinance No. 7, art. II, §§ 1-2 (Jan. 4, 1977). Thereafter, HUD granted the Housing Authority authorization and funding to build 153 homes.

Construction of the homes took place between 1979 and 1980. The homes, at least in retrospect, were not constructed well. The homes were built with wood foundations, and the wood products used to build the foundations were chemically treated with arsenic and other toxic chemicals. Plaintiffs allege, as the crux of their claim, that HUD *required* the use of wood foundations over the objection of tribal members, and that the Housing Authority acceded to that directive.

In the ensuing years, the foundations were, predictably, vulnerable to moisture accumulation and structural instability. Today, some of the houses are uninhabitable due to toxic mold and dried sewage residues. There has been a high incidence of cancer, asthma, kidney failure, respiratory problems, and other serious health problems among residents of the homes. Many residents have been advised to leave their houses for health reasons; some residents cannot leave because there are, quite simply, no affordable housing options in the area.

Plaintiffs represent those who purchased or leased these MHHO homes either directly or indirectly from the Housing Authority. They have made significant monthly payments and investments of their own time and/or resources, as required under the MHHO program. After it became clear that the houses were substandard and possibly hazardous, Plaintiffs sought assistance from the Housing Authority and from HUD in remedying the construction defects. When they received no assistance from either entity, Plaintiffs filed this class action complaint on August 2, 2002, in the District Court for the District of Montana seeking declaratory and injunctive relief and damages. They named, as Defendants, the Housing

Authority, its board members, and Mel Martinez, then-secretary of the Department of Housing and Urban Development. Plaintiffs allege that HUD and the Blackfeet Housing Authority violated statutory, contractual, and fiduciary duties owed to them.

HUD Defendants filed a motion to dismiss for lack of subject matter jurisdiction and a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Tribal Defendants filed a similar motion to dismiss based on tribal immunity. After hearings and further briefing, the district court granted both parties' motions to dismiss. Plaintiffs appealed.

II. Standard of Review

We review the question of subject matter jurisdiction *de novo*. *See Coyle v. P.T. Garuda Indon.*, 363 F.3d 979, 984 n.7 (9th Cir. 2004). Questions of tribal and sovereign immunity are also reviewed *de novo*. *See Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004); *Linneen v. Gila River Indian Cmty.*, 276 F.3d 489, 492 (9th Cir. 2002). Dismissal for failure to state a claim is likewise reviewed *de novo*. *See Decker v. Advantage Funding, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004).

III. Analysis

A. *Tribal Immunity for Board Members of the Blackfeet Housing Authority*

[1] An Indian tribe enjoys sovereign immunity from suit except where Congress authorizes the suit or the tribe waives its immunity. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Tribal immunity extends to both the corporate and governmental activities of the tribe. *See id.* at 754-55. It extends to agencies and subdivisions of the tribe, and has generally been held to apply to housing authorities

formed by tribes. *See, e.g., Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583 (8th Cir. 1998). Moreover, tribal immunity covers "tribal officials when acting in their official capacity and within their scope of authority." *United States v. Oregon*, 657 F.2d 1009, 1013 n.8 (9th Cir. 1981). Thus there is little doubt that the Blackfeet Tribe's sovereign immunity extends to the Blackfeet Housing Authority and to the members of the Blackfeet Housing Authority's board.

[2] We turn next to the question of waiver. Congressional abrogation of tribal immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citation omitted). Similarly, a tribe may voluntarily subject itself to suit by issuing a "clear" waiver. *See C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

Plaintiffs claim that a "sue and be sued" clause in the Enabling Ordinance that created the Blackfeet Housing Authority is a clear waiver of tribal immunity. The Enabling Ordinance states:

> The Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

Blackfeet Tribal Ordinance No. 7, art. V, § 2 (Jan. 4, 1977). For the reasons set forth below, we conclude that the "sue and be sued" clause of the Enabling Ordinance is a clear and unambiguous waiver of tribal immunity, and we reverse the district court's dismissal of the claims against the Housing Authority.

1. Caselaw

[3] The federal courts have had frequent occasion to interpret this "sue and be sued" clause. The text was proposed in HUD's model enabling ordinance, and is repeated in the enabling ordinance of many tribal housing authorities. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000) (commenting that "[d]ue to HUD's formulaic approach, several other decisions have dealt with substantially identical ordinances"). The courts have not, however, agreed in their interpretations. *See* Felix S. Cohen et al., *Cohen's Handbook of Federal Indian Law* § 4.04[3][a][ii] (2005) ("Some courts have held this language to be a waiver of the immunity of the tribal corporation, and others have not.").

[4] Two main lines of cases have emerged. First, there is a line of cases stating that the very existence of a "sue and be sued clause" waives the tribal immunity of housing authorities. In *Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975), the district court held that a construction contractor could sue the Bois Forte Reservation Housing Authority over a contract claim. The court rested its decision on the similarity between the model ordinance's "sue and be sued" clause and the "sue and be sued" clause used by the federal government when it creates a corporation. *See id.* at 27. The court noted that federal corporations are not immune from suit unless expressly created to be immune from suit, but that in the case of tribal housing authorities, it did not need to go that far because the "sue and be sued" clause was a clear expression that the corporation itself had surrendered its sovereign immunity. *See id.* at 26-27. Moreover, the court stated that it would be "grossly unfair" to dismiss the suit against the housing authority, where the tribe had "purported to create an independent corporation which would be legally responsible for its promises . . . [and] invited

outsiders to do business with it on a contractual basis." *Id.* at 29.

Subsequent cases followed *Namekagon* without adding much more to the analysis. *See, e.g., Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986); *Whitebird v. Kickapoo Hous. Auth.*, 751 F. Supp. 928, 929-30 (D. Kan. 1990); *Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987); *Duluth Lumber & Plywood Co. v. Delta Dev., Inc.*, 281 N.W.2d 377, 383-84 (Minn. 1979). The only authority in our circuit, *R.J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), also tracks this line of cases. In *R.J. Williams Co.*, we noted, in dictum, that the tribal immunity of the Fort Belknap Housing Authority was waived by the "sue and be sued" clause in the ordinance establishing the Housing Authority. *See id.* at 982 n.2. Similarly, the Blackfeet Tribal Court of Appeals has followed *Namekagon* and has permitted a contractual suit against the Housing Authority. *See DeRoche v. Blackfeet Indian Hous. Auth.*, 17 Indian L. Rptr. 6036, 6042 (Blackfeet Trib. Ct. App. 1989) ("Contrary to the housing authority's position, this tribal ordinance is an indisputable qualified waiver of immunity by the Blackfeet Tribe and housing authority for a breach of contract action. . . . With [this] tribal ordinance, the tribe waived, to some extent, the housing authority's immunity from suit." (citing *Namekagon*, 517 F.2d at 510)); *see also Davis v. Turtle Mountain Hous. Auth.*, 17 Indian L. Rptr. 6035 (Turtle Mountain Trib. Ct. 1990) (allowing a suit for declaratory relief against the housing authority based on shoddy workmanship on a MHHO house: "The court refuses to 'force plaintiffs out into the street or into the bush' as the defense of tribal immunity would do. . . . If the defendants let contractors off with substandard work, the immunity defense will not save the housing authority from declaratory relief.").

[5] Another line of cases from the Eighth and Second Circuits diverges from *Namekagon*. The Eighth Circuit, in *Dillon*

v. Yankton Sioux Housing Authority, 144 F.3d 581 (8th Cir. 1998), held that the "sue and be sued" clause alone did not waive tribal immunity. The court relied heavily on its own opinion in *Weeks Construction* to support its decision, stating that, in *Weeks Construction* "and the cases cited therein," there was a contract that expressly waived sovereign immunity. *Id.* at 583-84. The court held that, because the employee who sued the Yankton Sioux Housing Authority had no contract for employment, the tribe retained its immunity from suit.

We believe that *Dillon* provides little support for the proposition that the "sue and be sued" clause is not sufficient to waive tribal immunity, because it misreads *Weeks Construction*. Although both *Weeks Construction* and *Namekagon* dealt with a contract dispute, neither court relied on any explicit waiver of immunity in the contract in reaching its decision that the housing authority had waived its sovereign immunity. *See Weeks Constr.*, 797 F.2d at 670 ("Weeks contends that federal jurisdiction over this action exists because the "sue and be sued" clause contained in the tribal ordinance chartering the Housing Authority represents a waiver of sovereign immunity. . . . The Housing Authority does not dispute that it is amenable to suit."); *Namekagon*, 395 F. Supp. at 27 ("The Court finds that one of the purposes of the Ordinance [that created the Housing Authority] was to cut the corporation off from the protection of sovereign immunity . . . ."). In fact, neither court even mentioned whether the contracts at issue *contained* any kind of explicit waiver. *Dillon*'s lack of citation on this point is thus conspicuous.[3] We refuse to compound this error by putting any stock in *Dillon*.

The Second Circuit went further when it held that the "sue

[3]Accordingly, the cases that rely on *Dillon* with little or no additional analysis are similarly flawed. *See, e.g., Ninigret*, 207 F.3d at 30; *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047 (E.D. Wis. 1999).

and be sued" waiver was only a waiver in tribal courts, and did not confer any right on the federal courts to hear the case. *See Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76 (2d Cir. 2001). In *Garcia*, the court based its analysis on a rule that a waiver of sovereign immunity by a foreign sovereign or a state sovereign waives immunity only in the courts of that sovereign. *See id.* at 87. Thus, the Second Circuit held that the "sue and be sued" clause waived sovereign immunity only in tribal courts. *Id.*

We believe that *Garcia*'s approach is also problematic. The *Namekagon* court specifically considered and rejected the proposition that a tribe's waiver of immunity waived immunity only in that tribe's courts. As the *Namekagon* court noted, there is no language in the enabling ordinance that limits the "sue and be sued" waiver to tribal courts. 395 F. Supp. at 28. To reach its holding in *Garcia*, then, the court was forced to read quite a bit into the clause.

Moreover, the *Garcia* court was probably wrong to do so, given that some tribes — including the St. Regis Mohawk Tribe that was at issue in *Garcia* — did not *have* a tribal court at the time they entered into the model ordinances creating the housing authority. *See Garcia*, 268 F.3d at 90 (Katzmann, J., concurring in part and concurring in the judgment). As Judge Katzmann wrote, "it is a little awkward to read the 'sue and be sued' ordinance . . . as a waiver of sovereign immunity only in (apparently yet-to-be-envisioned-or-created) Tribal Courts." *Id.* The Blackfeet Housing Authority has not asked us to go as far as the Second Circuit, nor given us any additional reasons that we should limit the "sue and be sued" clause to tribal courts, and we see no reason to do so.

2. The Plain Meaning of the Housing Authority Enabling Ordinance

[6] Independent of the precedent on both sides, the plain meaning of the ordinance supports the approach taken in

Namekagon. First, the "sue and be sued" clause expressly permits suit on "any contract, claim or obligation arising out of its activities." Blackfeet Tribal Ordinance No. 7, art. V, § 2 (Jan. 4, 1977). This wording forecloses the argument that some further waiver must be obtained by a later contract; such a holding renders "claim or obligation" as surplusage. Moreover, the phrase "arising out of its activities" signals that the "sue and be sued" clause opens the door to liability that was not necessarily the product of negotiation, but rather liability that arose by virtue of the Housing Authority's conduct.

[7] Second, interpreting the "sue and be sued" clause as sufficient to waive the Housing Authority's immunity allows us to interpret the entire section consistently. The enabling ordinance has two clauses: (1) that the council "gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name"; and (2) that the council "authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have." *Id.* The first clause clearly has some *present* effect. To give meaning to the first clause, we must interpret it to mean that the tribe waived the Housing Authority's immunity from suit, i.e., that no further tribal consent was required. Moreover, by doing so, we do not render the second clause — authorizing the Housing Authority to agree by contract to waive any immunity "it might otherwise have" — surplusage. Given the unclear nature of the tribe's right to waive its own authority at the time the ordinance was written, *see* Cohen, § 7.05[1][c], at 642, such clarification is not superfluous. *See Namekagon*, 395 F. Supp. at 27 (noting that the second clause "simply indicates a desire to make the corporation's amenability to suit unqualifiedly clear"). Thus, the language of the enabling ordinance supports the conclusion that the "sue and be sued" clause effected a waiver of the Housing Authority's tribal immunity.

[8] Third, Article VII, clause 7 of the Enabling Ordinance provides that "any judgment against the [Housing] Authority" shall not be a charge or lien against Blackfeet Housing's prop-

erty, but instead could be satisfied out of "its rents, fees or revenues." This section clearly countenances that the Housing Authority would be subject to a judgment against it, and only limits the *funds* out of which such a judgment could be satisfied.

[9] Thus a plain reading of the Blackfeet Housing Authority's enabling ordinance supports Plaintiffs' argument that the Blackfeet Housing Authority intended to waive its immunity when it enacted the enabling ordinance.

3. Additional Reasons for Adopting *Namekagon*'s Approach

[10] Moving away from the text of the ordinance, the context in which such housing authorities were created also informs the interpretation we give these clauses. In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-494), which permitted tribes to form corporate and quasi-corporate entities that could enter into and compete in the world of commerce. Tribes could ratify a constitution, write bylaws and otherwise organize "for its common welfare" under Section 16 of the Indian Reorganization Act. *See* 25 U.S.C. § 477. While performing sovereign acts, a tribe organized under Section 16 enjoyed immunity as a sovereign. *See, e.g., Linneen*, 276 F.3d at 493 ("The 'sue and be sued' clause in the Community's corporate charter in no way affects the sovereign immunity of the Community as a constitutional, or governmental, entity.").

[11] Under Section 17 of the Indian Reorganization Act, tribes were also permitted to form corporate organizations — business corporations through which they could enter the world of commerce. *See White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 866 n.17 (9th Cir. 1987). Housing authorities are Section 17 organizations. *See* Cohen, § 4.04[3][a], at 256 (citing housing authority cases in examples of Section 17 organizations). Housing authorities are

public corporations with enabling ordinances that resemble articles of incorporation, and contain a hierarchical structure similar to a board of directors. Charters for Section 17 organizations often contain "sue and be sued" clauses like the one at issue here. *See* Cohen, § 4.04[3][a], at 256. And, although the Housing Authority "occupies a role quintessentially related to self-governance," *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001), a tribal housing authority is nonetheless a "public corporation carrying on public enterprises," *see Eligibility of Indian Tribes for Loans and Grants under National Housing Act of 1937*, 57 Interior Dec. 145, 149, 1940 WL 4162, at *4 (Dep't of the Interior 1940).

[12] The designation of an entity as a Section 16 or a Section 17 organization affects how we interpret any waiver of immunity. This court has been careful to separate a tribe's corporate functions from its governmental functions. Accordingly, we have refused to read a waiver of immunity in the Section 17 corporate context as abrogating immunity for the tribe's governmental actions as a Section 16 entity. *See, e.g., Linneen*, 276 F.3d at 492. In the same way, however, a "sue and be sued" clause in the enabling ordinance of a Section 17 entity must be examined in light of the rationale of Section 17. The purpose of allowing tribes to create Section 17 corporations, even corporations that perform some quasi-governmental role, is to allow tribal entities to fully participate in the world of commerce. *See* 78 Cong. Rec. 11732 (1934) (noting that, in allowing tribes to incorporate under Section 17, Congress sought to promote the organization of tribal business enterprises and to enable those enterprises "to enter the white world on a footing of equal competition"). And:

> It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all the rights and advantages of a trading corporation, and the ability to sue, and yet be itself immune from

> suit, and able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right.

Namekagon, 395 F. Supp. at 29 (citing *Fed. Sugar Ref. Co. v. U.S. Sugar Equalization Bd.*, 268 F. 575, 587 (S.D.N.Y. 1920)). Where there is an express waiver of tribal immunity, such as this "sue and be sued" clause, we should read that waiver in light of the purpose of Section 17. Because "developers and lenders will be reluctant to deal with a corporation which is legally irresponsible and cannot be made to answer for its debts," *id.* at 29, tribes can compete fully in the business world only if they voluntarily agree to limit their right to immunity.

Finally, the language of *Namekagon* that it is "grossly unjust" to interpret such a clear "sue and be sued" clause as anything less than a waiver of tribal immunity rings true here as well. The Housing Authority invited individuals to do business with it. It signed contracts with these Plaintiffs, bound the homeowners to make payments, and had contractual remedies in the event that Plaintiffs breached their promises. To interpret the "sue and be sued" clause in the manner suggested by the Housing Authority would render the Housing Authority's contractual obligations illusory.

[13] For these reasons, we hold that the Tribe waived the immunity of the Housing Authority when it enacted the enabling ordinance with its "sue and be sued" clause, subject to the limitations contained in the enabling ordinance. Of course, the enabling ordinance contains two important limitations on the Housing Authority's liability: (a) Article V, Cl. 2: the Tribe shall not be liable for the debts or obligations of the Authority; and (b) Article VII, Cl. 7: No judgment shall be a lien upon Authority property; judgments may only be enforced out of the Authority's rents, fees or revenues. Because a sovereign is entitled to set the terms on which it waives its immunity, such limits restrict the ability of Plain-

tiffs to collect damages against the Housing Authority. We remand Plaintiffs' claims against the Housing Authority to the district court for further proceedings.

B. *Motion to Dismiss by the Secretary of the Department of Housing and Urban Development*

Plaintiffs appeal dismissal of the following claims against HUD: (a) a claim based on a violation of the trust responsibility; (b) a claim based on a violation of the Administrative Procedures Act; and (c) a claim for breach of contract. We affirm the district court's decision on each claim.

1. Violation of Trust Responsibility and Fiduciary Duties

Plaintiffs allege that HUD has violated its trust responsibility to tribal members.[4] Plaintiffs' trust responsibility claims are based on the Mitchell Doctrine, which derives its origins from *United States v. Mitchell*, 445 U.S. 535 (1980) (*"Mitchell I"*) and *United States v. Mitchell*, 463 U.S. 206 (1983) (*"Mitchell II"*). These two cases concerned a suit by tribal members who lived on the Quinault Indian Reservation. The plaintiffs sued the Secretary of the Interior for damages based on alleged mismanagement of timber resources on land held in trust. In *Mitchell I*, 445 U.S. at 542, the Supreme Court found that the General Allotment Act, under which tribal land was taken into trust, created only a limited trust relationship between the United States and the tribal member as it related to timber management. The Court noted that the

[4]Count Three of Plaintiffs' original complaint alleged that HUD has violated: (a) the United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437x; (b) the Indian Housing Act, 42 U.S.C. §§ 1437aa-1437ee; (c) the Native American Housing Assistance and Self-Determination Act of 1996, 25 U.S.C. §§ 4101-4243; and (d) the Housing Act of 1949, 42 U.S.C. §§ 1441-1490. On appeal, Plaintiffs did not challenge the district court's holding that no express or implied right of action existed under those statutes. Accordingly, we do not consider those statutes here.

statute did not impose any responsibility for timber management on the federal government and left all beneficial use of the land in the allottee, not in the government. *See id.* at 542-55. The case was remanded to consider whether any other basis existed to find a full trust responsibility.

When the case returned to the Supreme Court, the Plaintiffs framed the trust responsibility on statutes that gave the Department of the Interior " 'comprehensive' control over the harvesting of Indian timber." *Mitchell II*, 463 U.S. at 209. This time, the Court found that the general trust relationship between the federal government and the tribal members culminated in full fiduciary responsibility because the Secretary of the Interior was granted statutory authority to exercise substantial control over the harvest of tribally-owned timber. Under the statute, the Secretary was required to consider " 'the needs and best interests of the Indian owner and his heirs.' " *Id.* at 209 (quoting 25 U.S.C. § 406(a)). Pursuant to this authority, the Secretary of the Interior promulgated regulations that addressed "virtually every aspect of forest management," essentially squeezing the tribe out of the opportunity to manage its own timber. *Id.* at 220. The Court concluded that this decision to take control of a tribally-owned resource and to manage it for the benefit of the tribe created fiduciary responsibilities, the breach of which mandated damages. *See id.* at 226.

[14] This pair of cases sets the stage for how we consider *Mitchell* claims: the general "ward-custodian" relationship between the federal government and the tribes does not give rise to fiduciary duties. But where the government takes full control of a tribally-owned resource and manages it to the exclusion of the tribe, a fiduciary relationship is created and the government bears responsibilities as a fiduciary.

HUD's control over the MHHO projects is certainly pervasive. HUD set minimum property standards for MHHO hous-

ing. *See* 24 C.F.R. § 805.212(a) (1979).[5] Although the Housing Authority initially designed the projects, HUD retained the authority to alter those designs. *See id.* § 805.212(b)-(c). The Housing Authority had to keep the cost of the houses they designed within a HUD-mandated "prototype cost" for each area. *See id.* §§ 805.213(a), (c), 805.214(b). The Housing Authority was not permitted to enter any contract for materials or labor without HUD's approval. *See id.* § 805.211(a)-(b).

[15] There is a fatal flaw, however, in Plaintiffs' *Mitchell* claim. Plaintiffs rely solely on the general trust responsibility that exists between the federal government and American Indians. But fiduciary duties arise under *Mitchell* only where the federal government pervasively regulates a tribally-owned resource. Plaintiffs offered no argument as to why a grant of HUD funds should be considered a tribal resource or why the general trust responsibility between the federal government and American Indians was focused into specific fiduciary duties. To say that government funding, conditioned on the performance of certain acts and heavily regulated by a government agency, is a tribal resource subject to *Mitchell* fiduciary duties is a step we are unwilling to take in the absence of precedent extending the doctrine that far. Because Plaintiffs have not shown that HUD took a pervasive role in the management of a tribal resource, we hold that no *Mitchell* fiduciary duty existed.

Later congressional acts dealing with Indian Housing have not provided any additional concrete duties that would give rise to a claim against HUD. Under the Indian Housing Act of 1988 and the Native American Housing Assistance and Self-Determination Act of 1996, HUD was *permitted*, not required, to provide additional money to housing authorities

[5]These minimum property standards, incidentally, appear to permit the use of wood foundations such as those used in Plaintiffs' home. *See* 24 C.F.R. pt. 200, subpt. S, app. (1976).

for the repairs. *See* 25 U.S.C. § 4132(1)-(5). Moreover, maintenance duties lay exclusively with individual home owners. *See* 24 C.F.R. § 805.418(a)(1) (1979). Because the Indian Housing Act and the Native American Housing Assistance and Self-Determination Act of 1996 did not add to the management responsibilities of HUD, they do not alter our *Mitchell* analysis. Accordingly, on the claims presented to us, we conclude that no *Mitchell* fiduciary duty existed.

2. Violation of the Administrative Procedure Act

[16] Plaintiffs alleged that they are entitled to relief under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 702-706. The APA grants a cause of action to persons injured by administrative action. *See* 5 U.S.C. § 702. A claim under the APA requires, *inter alia*, that the claimant seeks "relief other than money damages." *Id.*; *see also Bowen v. Massachusetts*, 487 U.S. 879, 895-902 (1988). Examination of the relief Plaintiffs sought does not stop at the parties' allegations. Instead, "the substance of the pleadings must prevail over their form." *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 361 (5th Cir. 1987) (interpreting monetary damages under the Tucker Act). Our task, then, is to "discern the nature of the relief being sought and focus on the type of relief that will result from the action." *Id.* at 362.

In this case, although Plaintiffs nominally claim equitable and injunctive relief, the substance of their claim is that they are owed money damages from the federal government. As Plaintiffs admitted at oral argument, their purpose in seeking a declaratory judgment is that it would enable them to seek monetary damages in other fora. Under the APA, however, Plaintiffs cannot seek relief that is essentially the equivalent of monetary damages. *See id.* at 362 (finding that the plaintiffs were, in essence, seeking monetary relief where "money would 'flow from,' or be the 'natural consequence' of" a review of agency action); *Gray v. Rankin*, 721 F. Supp. 115, 119 (S.D. Miss. 1989) (noting that "a complaint seeks relief

other than money damages within the meaning of the Administrative Procedure Act only if the equitable relief sought has a 'significant prospective effect or considerable value apart from merely determining monetary liability of the government' ") (citations omitted); *cf. Bakersfield City Sch. Dist. of Kern County v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979) ("[I]t is firmly established that, where the real effort of the complaining party is to obtain money from the federal government, the exclusive jurisdiction of the court of claims over non-tort claims exceeding $10,000 cannot be evaded or avoided by framing a district court complaint to appear to seek only injunctive, mandatory or declaratory relief against government officials or the government itself.").

[17] Similarly, an injunction is not available to Plaintiffs in this case. Injunctions are generally not permissible unless a legal damages remedy would be insufficient. *See Cont'l Airlines, Inc. v. Intra Brokers, Inc.*, 24 F.3d 1099, 1104 (9th Cir. 1994); Charles Wright et al., *Federal Practice and Procedure* § 2944 (2d ed. 1995). Here, money damages in an amount necessary to repair or rebuild Plaintiffs' home would be a sufficient remedy, and, therefore, an injunction is not an available remedy. Because Plaintiffs have no remedy apart from legal damages, a claim under the APA is not appropriate.

In the alternative, Plaintiffs have argued that their claims are permitted under *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, the Court noted that a claim under the APA is not precluded simply because a "judicial remedy may require one party to pay money to another." *Id.* at 893. Rather, the APA forbids claims based on "a sum of money used as compensatory relief . . . to substitute for a suffered loss." *Id.* at 895. A plaintiff can, however, bring a claim under the APA if the plaintiff seeks money as a "specific remed[y] . . . the very thing to which he was entitled." *Id.* (citing Dan B. Dobbs, *Handbook on the Law of Remedies* 135 (1973)). Thus, for example, a claim under the APA is appropriate where a statute entitles a claimant to a specific amount of money, and

an administrative agency wrongfully withholds that money from the claimant.

Plaintiffs in this case clearly seek compensatory damages, not money as a specific equitable remedy. Plaintiffs claim that they were harmed because HUD caused their houses to be constructed in a substandard manner. Plaintiffs want a sum of money that would redress a wrong caused to them — a legal damage, not an equitable one. Accordingly, their claims cannot be brought under the APA.

3. Breach of Contract Claims

[18] Finally, the district court properly found that it was without jurisdiction to review Plaintiffs' breach of contract claims. The Tucker Act vests the Court of Federal Claims with exclusive jurisdiction for contract claims against the United States. *See* 28 U.S.C. § 1491(a)(1). The Little Tucker Act carves out a minor exception, creating concurrent jurisdiction in the district courts for contract claims against the United States not exceeding $10,000. *See* 28 U.S.C. § 1346(a)(2). While parties may waive their right to receive more than $10,000, *see United States v. Johnson*, 153 F.2d 846, 848 (9th Cir. 1946), Plaintiffs have not done so in this case. Thus, given that Plaintiffs seek monetary damages in excess of $10,000, the District Court correctly determined that it was without jurisdiction to hear Plaintiffs' contract claims against HUD.[6] We likewise, then, lack jurisdiction to review Plaintiffs' contract claims.

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[6]Contrary to Plaintiffs' assertions, where a case falls under Tucker Act jurisdiction, federal question jurisdiction cannot serve as an alternative basis for jurisdiction. Plaintiffs cite a Seventh Circuit case holding that federal question jurisdiction can be an alternative basis for jurisdiction, *W. Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280-81 (7th Cir. 1991), and indeed the circuits appear to be divided on this question. *Compare C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 903 F.2d 114, 118-20 (2d Cir. 1990) (finding Tucker Act jurisdiction not exclusive, where there is federal ques-

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's dismissal of claims against HUD. We REVERSE, however, the dismissal of Plaintiffs' claims against the Blackfeet Tribal Housing Authority, and REMAND for proceedings in accordance with this opinion. The parties shall bear their own costs on appeal.

PREGERSON, Circuit Judge, specially concurring:

I write separately to point out the manifest injustice of releasing the federal government from responsibility in this suit. The relationship between the federal government and the tribes has been one of promises carelessly made and callously broken. Here we see that in the area of tribal housing, as in so many other areas, we as a nation have ignored the collateral consequences of our conduct toward American Indians and have utterly failed to live up to our promises. We have a moral duty, if not a legal duty, to remedy the harm caused to these Plaintiffs.

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tion jurisdiction and a waiver of sovereign immunity), *with A.E. Finley & Assoc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990) ("[I]f an action rests within the exclusive jurisdiction of the Claims Court under the Tucker Act . . . the district court does not have jurisdiction regardless of other possible statutory bases."). The Ninth Circuit has not squarely confronted the particular arguments raised in those two cases, but has generally held that Tucker Act jurisdiction is exclusive. *See, e.g., Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 (9th Cir. 2005) (en banc); *M-S-R Pub. Power Agency v. Bonneville Power Admin.*, 297 F.3d 833, 840 (9th Cir. 2002); *Wilkins v. United States*, 279 F.3d 782, 785 (9th Cir. 2002). We see no reason to disturb that conclusion here. Because Tucker Act jurisdiction is exclusive, except where the Little Tucker Act provides concurrent district court jurisdiction, such claims are properly reviewed in the court of claims, not in the federal district courts.

Much tribally-owned land, including the land at issue here, is held in trust "indefinitely." 25 U.S.C. § 462. The decision to hold the land in trust was made, in part, to prevent tribes from unwisely alienating their land. As the Supreme Court noted: "[W]hen Congress enacted the General Allotment Act, it intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but *simply because it wished to prevent alienation of the land* and to ensure that allottees would be immune from the state taxation." *See United States v. Mitchell*, 445 U.S. 535, 544 (1980) (emphasis added). In so doing, we promised to guard the tribes's property rights for a period of time, while they prepared to "cope on equal footing" with the "white man who might attempt to cheat him out of his newly acquired property." *See* 18 Cong. Rec. 190 (1886) (statement of Representative Skinner).

However admirable the government's motivations, the decision to take tribal land in trust had adverse consequences: by holding tribal land in trust and preventing alienation, the federal government prevented the tribe from developing its own private housing market. For example, in a recent publication, the United States Commission on Civil Rights reported that American Indians have consistently found it difficult to obtain mortgages on their land because the land is held in trust and therefore cannot be used as collateral. *See* U.S. Comm. on Civil Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* 63, *available at* http://www.usccr.gov/pubs/na0703/na0204.pdf [hereinafter *A Quiet Crisis*]; *see also* H.R. Rep. 100-604 (1988), *reprinted in* 1988 U.S.C.C.A.N. 791, 795. Similarly, private housing developers have been deterred from entering tribal housing markets because the property, once developed, cannot be alienated. *See A Quiet Crisis*, at 63.

The federal government has exercised pervasive control over tribal land, and in so doing, has severely limited the

tribe's control over its own economic development. In fact, according to one House Report relating to the passage of the Indian Housing Act, HUD's Mutual Help and Homeownership Program was the "only reasonable source of housing in many reservations," *see* H.R. Rep. 100-604, *reprinted in* 1988 U.S.C.C.A.N. 791, 795, in part because the land was held in trust. That is, while the goal of the General Allotment Act was to prevent *unwise* alienation of the land, the result was to prevent *any* encumbrance of the land for the purpose of building or improving housing. The effect was to freeze out developers from entering the private tribal housing market, and to leave the tribes with no option but to wait for the federal government to provide safe, decent, and sanitary housing.

Congress has, in more recent years, recognized that the federal government's control over the land and its general trust relationship with the tribes creates a responsibility for the federal government to remedy the deplorable housing conditions on reservations. *See* Native American Housing Assistance and Self-Determination Act of 1996 ("NAHASDA"), 25 U.S.C. § 4101(2)-(5). NAHASDA recognizes that:

> [T]he Congress, through treaties, statutes, and the general course of dealing with Indian tribes, has assumed a trust responsibility for the protection and preservation of Indian tribes and for working with tribes and their members to improve their housing conditions and socioeconomic status so that they are able to take greater responsibility for their own economic condition; . . . [Moreover,] providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping tribes and their members to improve their housing conditions and socioeconomic status.

25 U.S.C. § 4101(4)-(5).

As suggested in the findings under NAHASDA, the federal government's duty to remedy tribal housing conditions existed even before NAHASDA -- it derives from treaties and the "general course of dealing" with tribes. During the process of forcing the tribes onto reservations, many tribes were explicitly promised housing in exchange for land cession. *See* Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. BlackLetter L.J. 211, 215-23 (2002). Others were promised money that was intended to "promote their civilization." *See id.* at 218-19; *see, e.g.*, *White Mountain Apache Tribe of Arizona v. United States*, 26 Cl. Ct. 446, 465, 466-67 (1992).[1] The Court of Claims has held that treaty language such as the "requisites to 'promote civilization' " includes a covenant to provide housing. Thus, the federal government has long promised that it would assist American Indian tribes in providing housing.

Later, when much of tribal land was taken into trust under the General Allotment Act, it was done with an eye toward ensuring that every American Indian had a "homestead of his own with assistance by the government to build houses and fences, and open farms." *See* Davis, 18 Harv. BlackLetter L.J. at 224 (quoting Comm'r of Indian Affairs, *Annual Report* iv-v (1885)). Henry Dawes, proponent of the General Allotment Act, stated that holding tribal land in trust as a means of "civilizing" the American Indian would not work unless housing was also provided: "If [the American Indian] starts wrong; if he comes upon the homestead and is left there with no house to put himself in . . . what is to become of him? He had better never have been put there." *See* Davis, 18 Harv. BlackLetter

[1]Indeed, the Blackfeet Indian signed such a treaty. Treaty with the Blackfoot Indians, art. X, October 17, 1855, 11 Stat. 727 ("The United States further agree to expend annually, for the benefit of the aforesaid tribes of the Blackfoot Nation, a sum not exceeding fifteen thousand dollars annually, for ten years, in establishing and instructing them in agricultural and mechanical pursuits, and in educating their children, and in any other respect promoting their civilization and Christianization.")

L.J. at 224 (quoting Henry Dawes, Defense of the Dawes Act (1887)). Once again, when the government took the land in trust, it committed itself to play a major role in housing the trust land's occupants.

We have failed miserably in this duty. For much too long, our nation simply ignored our responsibility to assist the tribes in building houses. In 1966, the Bureau of Indian Affairs estimated that 75% of houses on Indian reservations and in the territory of the Alaska Natives were substandard, and that two-thirds "were too run down even to merit improvement." *See A Quiet Crisis* at 52. And yet, despite the advances made in the general population with the passage of the United States Housing Act of 1937, the federal government did little to remedy the substandard housing conditions on the reservations.

When HUD finally decided to extend its aid to the tribes in the 1960s, *see* Susan J. Ferrell, *Indian Housing: The Fourth Decade*, 7 St. Thomas L. Rev. 445, 452-53 (1995), the chosen vehicle was the Mutual Help and Homeownership Program ("MHHO Program"), through which homes were to be "completed at the lowest possible cost." U.S. Dep't of Hous. & Urban Dev., Manual 7440.1; Interim Indian Housing Handbook 3-40 (1976). In HUD's zeal to save money, it forced Plaintiffs' families — and probably members of countless other tribes — to decide between rejecting HUD funding altogether or living in homes that were cheaply built, homes that tribal members knew would not withstand the Montana climate for any period of time. These Plaintiffs, understandably, chose to take what they could get. And, as a result, Plaintiffs now live in homes infested with black mold and other toxins, plagued with structural disintegration, and that have caused high incidence of kidney failure, cancer, headaches and bloody noses in the home's residents. Yet many Plaintiffs remain in MHHO housing because, in many cases, "it is the only housing they can afford." *See* Jessie McQuillan, *Rotten*

Deal, Missoula Indep., April 6, 2006, *available at* http://www.missoulanews.com/News/News.asp?no=5625.

Even after this situation was brought to HUD's attention, the federal government refused to step in and remedy the harm. Before filing this suit, Plaintiffs tried unsuccessfully for years to obtain funding to repair their houses, but their pleas fell on deaf ears. As HUD's counsel stated at oral argument, despite HUD's present desire to try to settle the case, Congress has not allocated sufficient discretionary funding to allow HUD any latitude to alleviate this most grievous situation on the Blackfeet Reservation.

The lack of affordable housing alternatives and the federal government's callousness to Plaintiffs' suffering have condemned Plaintiffs to live in dangerous houses that are making them sick. Under the theories presented here, we cannot offer Plaintiffs any relief against HUD. But our nation's responsibility to the Blackfeet Tribe and its members is deeper than a legal responsibility; it is also a moral responsibility. If we are serious about this duty, the federal government should recognize the consequences of its actions. We as a nation should live up to the promises that we have made. We should come to the assistance of the men, women, and children who will continue to live in absolute squalor until we step in.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MARTIN MARCEAU, CANDICE LAMOTT, JULIE RATTLER; JOSEPH RATTLER, JR., JOHN G. EDWARDS, JR., MARY J. GRANT; GARY GRANT and DEANA MOUNTAIN CHIEF, on behalf of themselves and others similarly situated, Plaintiffs, v. BLACKFEET HOUSING and its Board members SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF KELLY EDWARDS, and URSULA SPOTTED BEAR, & MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA, Defendants	No. CV-02-73-GF-SEH MEMORANDUM AN AND ORDER

BACKGROUND

Plaintiffs brought this action against Blackfeet Housing, four of its former board members,[1] and Mel Martinez, Secretary of the Department of Housing and Urban Development (HUD), for money damages and to obtain repairs to Plaintiffs' homes located on the Blackfeet Indian Reservation.[2] Blackfeet Housing's predecessor, Blackfeet Indian Housing Authority between 1977 and 1980, built approximately 153 low-income homes on the Blackfeet Indian Reservation under HUD's Mutual Help Homeownership and Opportunity Program. (MHHO Program), a program designed to help low-come Indian families become homeowners. Federal law required the homes to be "decent, safe, and sanitary." 42 U.S.C.§1437A(b)(1)(1976). HUD provided financial assistance for the construction of the homes.

Plaintiffs are eight Indian persons who purchased homes built under the MHHO Program. The homes have chemically-treated wood foundations. The Amended Complaint asserts that problems inherent to wooden foundations have exposed Plaintiffs to mold and other toxic

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[1] Blackfeet Housing and the former board members are referred to in this Memorandum and Order as the "Tribal Defendants."

[2] The suit against Martinez in his official capacity as Secretary of HUD is in effect a suit against HUD. Kentucky v. Graham, 473 U.S. 159, 165-66 (1895). For purposes of this Memorandum and Order, HUD will be designated as the Defendant.

substances. Relief sought includes claims for damages and claims for repair or replacement of the homes.[3] Defendants have moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.[4] The Tribal Defendants have also moved for a protective order precluding further discovery pending ruling on their motion to dismiss. Hearing on the motions was held on November 12, 2003. Supplemental briefs and supporting documents requested by the Court were submitted in December of 2003.[5]

HUD'S MOTION TO DISMISS

A. Counts 1 and 3—Trust Responsibility Claim and Claim for Injunctive Relief

Counts 1 and 3 of the Amended Complaint assert claims against HUD for damages for breach of trust responsibility and for injunctive relief. The claims are based upon five statutes: the United States Housing Act of 1937 (USHA), 42 U.S.C. §1437-1437x; the Indian Housing Act of 1988 (IHA),

[3]Counts 2 and 3 seek mandatory injunctive relief in the form of repair or replacement of the homes. Counts 1, 4, 5, 6 and 7 seek monetary damages.

[4]HUD's Rule 12(b)(6) motion is, in substance, a Rule 56 motion. Both HUD and Plaintiffs rely on documents outside the pleadings. In re Rothery, 143 F.3d 546, 548-49 (9th Cir. 1998); San Pedro Hotel Co., Inc. City of Los Angeles, 159 F. 3d 470, 476-77 (9th Cir. 1998).

[5]The documents requested by the Court and provided by the parties include HUD regulations in effect at the time Plaintiffs' homes were built.

42 U.S.C. §1437aa-ff; the Native American Housing and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. §4101 *et sq.*; the Housing Act of 1949, 42 U.S.C. §1441 *et seq.*; and the National Housing Act (HHA), 12 U.S.C. §§1702-1750.

Four criteria must be met to establish a cognizable claim against HUD grounded in any one of the five statutes relied upon by Plaintiffs:

(1) That HUD was subject to a statutory duty–In this case, to ensure Plaintiffs' homes were constructed and maintained in a safe and sanitary condition;

(2) That HUD breached that duty;

(3) That a private right of action against HUD to enforce the breach was available; and

(4) That sovereign immunity with respect to the private right of action was waived.

United States v. White Mountain Apache Tribe, 537 U.S. 465, 472 (2003); United States v. Mitchell, 463 U.S. 206, 212-17 (1983); FDIC v. Meyer, 510 U.S. 471, 484 (1994). In the absence of any one of the criteria, no claim may be asserted.

A private right of action against HUD may be established in three ways. First, a private right of action may be implied from a statute's language and structure. Mitchell, 463 U.S. at 216-17. Second, a private right of action may be implied from a statute's language and structure. Alexander v. Sandoval, 532 U.S. 275, 286-92 (2001); Cort v. Ash, 422 U.S. 66, 78 (1975); Dewakuku v. Martinez, 217 F.3d 1031, 1037-40 (Fed. Cir. 2001). Third, a private right of action may be said to exist under the judicially created "Mitchell Doctrine," if a statute and its implementing regulations impose upon HUD full responsibility to manage or control an Indian resource for the benefit of Indians. United States v. Navajo Nation, 537 U.S. 488, 504-07 (2003); White Mountain Apache Tribe, 537 U.S. at 472-74; Mitchell, 463 U.S. at 224-25. The statutes and regulations relied upon by Plaintiffs will be examined, in turn, to determine whether they support cognizable claims against HUD.

The United States Housing Act of 1937

Plaintiffs' homes were built under the authority of the USHA, 42 U.S.C. §1437 *et seq.* (1976), its implementing regulations and the Interim Indian Housing Handbook, 7440.1 (March 1976). Although courts have recognized a waiver of sovereign immunity for claims authorized by the USHA (Dewakuku, 217 F.3d at 1036), that act cannot support a trust responsibility claim or a claim for injunctive relief against HUD. The legislation does not specify a private right of action. 42 U.S.C.

§1437 *et seq.* (1976). A private right of action likewise cannot be implied from the language and structure of USHA. Perry v. Housing Auth. of Charleston, 664 F.2d 1210, 1217 (4th Cir. 1981). Finally, a private right of action cannot be said to exist under the Mitchell Doctrine because neither USHA, nor its implementing regulations, nor the Interim Indian Housing Handbook, imposed upon HUD responsibility to control the construction and maintenance of public housing on the Blackfeet Indian Reservation.

The Blackfeet Indian Housing Authority was responsible for designing and constructing the homes built under the MHHO Program. Interim Indian Housing Handbook 7440.1 ch. 2, p. 2-1 (HUD 1976); 42 U.S.C. §1437(a)(1976); 24 C.F.R. §805.203 (1976). HUD only reviewed the Housing Authority's activities to ensure the homes complied with HUD's Minimum Property Standards. 24 C.F.R. §§805.210; 805.211(b), 805.212 (1976); 24 C.F.R. pt. 200, subpt. S (1976); Interim Indian Housing Handbook 7440.1 chs. 3, 5, 6, pp. 3-19 to 3-21, 5-1 to 6-48 (HUD 1976).[6] HUD was not responsible for maintaining the homes

[6]Plaintiffs contend that HUD should not have permitted the Blackfeet Indian Housing Authority to build homes on chemically-treated wood foundations because it was not permitted under HUD's Minimum Property Standards. The applicable Minimum Property Standards list the use of pressure-treated timber foundations as an accepted engineering practice. See 24 C.F.R. pt. 200, subpt. S. App. (1976); see also, *Minimum Prop. Stands. For One and Two Fam. Dwellings*, HUD Handbook 4900.1, pp E-1 to E-2, app. E (HUD 1973 ed.).

built by the Blackfeet Indian Housing Authority under MHHO Program. Maintenance responsibilities rested exclusively with the home buyers and the Housing Authority. 24 C.F.R. §805.418(a)(1), (a)(2)(ii)(1976).

The Indian Housing Act of 1988

The IHA, which amended the USHA, was enacted approximately 8 years after Plaintiffs' homes were built. By that legislation, Indian housing programs were moved into a separate title within the USHA. 42 U.S.C. §1437aa-ff (1988).

The IHA does not support a trust responsibility claim or a claim for injunctive relief against HUD because a private right of action does not exist under the act.[7] A private right of action is not expressed in the act. 42 U.S. C §1437aa-ff (1988). Nor can a private right of action be implied from the language and structure of the IHA. Dewakuku, 271 F.3d at 1037. Finally, neither the IHA nor its implementing regulations imposed upon HUD a duty to ensure that homes built under the MHHO Program were properly maintained. 42 U.S.C. §1437aa-ff (1988); 24 C.F.R. §905 *et seq* (1991). Maintenance responsibilities rested exclusively with the home buyers and the Blackfeet Indian Housing Authority. 42 U.S.C. §1437bb(c)(3) (1988); 24 C.F.R.

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[7]Since the IHA amended the USHA, the court recognized waiver of sovereign immunity in the USHA would apply to claims arising under the IHA. Dewakuku, 217 F.3d at 1036.

§905.428(a)(1), (a)(2)(ii) (1991). Consequently, there is no private right of action under the Mitchell Doctrine within the IHA.

The Native American Housing and Self-Determination Act of 1996

In 1996, the IHA was repealed and replaced by NAHASDA's Indian housing block grant program. 25 U.S.C. §4101 *et seq.*; 24 C.F.R. pt. 1000 (1997). NAHASDA and its implementing regulations now provide the exclusive mechanism for controlling HUD's role in Indian public housing.

NAHASDA does not support a trust responsibility claim or a claim for injunctive relief. A private right of action is not expressly provided for in NAHASDA. 25 U.S.C. §4101 *et seq.* Nor can a private right of action be implied from the language and structure of the act. Id. And, a private right of action cannot be said to exist under the Mitchell Doctrine because neither NAHASDA, nor its implementing regulations, impose on HUD a duty to manage or control the maintenance of public housing on Indian lands. 25 U.S.C. §4101 *et seq.*; 24 C.F.R. §1000.200 *et seq.*(2003). In short, a private right of action does not exist under NAHASDA.

Under NAHASDA, HUD makes block grants to Indian tribes to enable the tribes to develop their own public housing program. 25 U.S.C. §§4103(18), (21), 4111(a), 4152 (2000); 24 C.F.R. §§ 1000.201, 1000.202, 1000.301-1000.340 (2003). Indian tribes

are responsible for maintaining the public housing they build. 25 U.S.C. §4133(b)(2000). HUD has only limited oversight responsibilities to ensure the tribes use the grant funds for eligible activities. 25 U.S.C. §4165(b)(1)(2000); 24 C.F.R. §1000.520 (2003).

The trust responsibility claim, based on NAHASDA, must also be dismissed because HUD has not waived its sovereign immunity for that claim. NAHASDA itself contains no waiver of immunity, and the waiver in the Little Tucker Act, 28 U.S.C. §1346(a)(2), does to apply because Plaintiffs have failed to forego damages in excess of the $10,000 jurisdictional limitation in that act. Demontiney v. United States, 255 F.3d 801, 809 (9th Cir. 2001); Price v. United States Gen. Serv. Admin., 894 F.2d 323, 324 (9th Cir. 1990).

The Housing Act of 1949

The Housing Act of 1949 was enacted to help all families in America obtain decent homes and suitable living environment. 42 U.S.C. §1441a(2000); Cedar-Riverside Assoc., Inc. v. City of Minneapolis, 606 F.2d 254, 257 n.9 (8th Cir. 1979). The Housing Act of 1949 likewise cannot support a trust responsibility claim or a claim for injunctive relief against HUD. A private right of action is not expressly provided for in the act. 42 U.S. C. §1441 *et seq.* A private right of action may not be implied from the language and structure of the act. Cedar-Riverside Assoc., 606 P.2d at 258. And, as with the other acts under consideration, a private right of

action cannot be said to exist under the Mitchell Doctrine since neither of the Housing Act of 1949 nor its implementing regulations imposed upon HUD a duty to control the construction or maintenance of public housing on Indian lands. 42 U.S.C. §1441 *et seq* (2000). Moreover, the Housing Act of 1949 contains no waiver of sovereign immunity.

The National Housing Act

The NHA was enacted in 1937 to assist private industry in providing housing for low and moderate income families. 12 U.S.C. §§1715(a), 1738(a)(2000). Congress sought to accomplish the legislative purpose by encouraging private investment in the construction of public housing. The NHA permits HUD to guarantee the repayment of mortgage loans made by private lenders. Pankow Construction Co. v. Advance Mortgage Corp., 681 F.2d 611, 614 (9th Cir. 1980); El Dorado Springs v. United States, 28 Fed. Cl. 132, 133 (1993). The NHA cannot support a trust responsibility claim or a claim for injunctive relief against HUD absent a determination that the NHA imposed upon HUD a duty to supervise the construction or maintenance of public housing on Indian lands. No such duty can be found in the language of the act. 12 U.S.C. §§1702-1750 (2000).

The trust responsibility claim, to the extent it is based on the NHA, must also be dismissed for lack of waiver of sovereign immunity. The NHA's waiver of sovereign immunity does not apply to the trust

responsibility claim, since the waiver is limited to claims arising from HUD's activities as an insurer of mortgages. 12 U.S.C. §1702 (2000). Likewise, the waiver of sovereign immunity in the Little Tucker Act does not apply since Plaintiffs' damages claims exceed the $10,000 jurisdictional limitation in that act. El Dorado Springs, 28 Fed. Cl. At 136; Demontiney, 255 F.3d at 809.

B. Count 2—the APA Claim

Count 2 asserts a claim for injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.*, based on HUD's failure to comply with a purported duty, under NAHASDA, to repair any unsafe and unsanitary conditions in Plaintiffs' homes. Plaintiffs seek an order directing HUD to comply with the claimed duty.

The APA is a procedural statute. Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327, 1329 (9th Cir. 1997). It does not, itself, create substantive rights. El Rescate Legal Services, Inc. v. Executive Office of Immigration Review, 959 F.2d 742, 752 (9th Cir. 1992). It permits judicial review of federal agency actions to determine whether a federal agency violated a duty imposed by another statute. 5 U.S.C. §702 (2000); Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882-83 (1990).

The APA claim must be dismissed. Neither NAHASDA nor its implementing regulations impose

a duty upon HUD to maintain Plaintiffs' homes. Any duty to repair Plaintiffs' homes rests exclusively with Plaintiffs and Blackfeet Housing. 25 U.S.C. §4133(b)(2000).

C. Counts 4, 5 and 6— Breach of Contract Claims.

Counts 4, 5 and 6 assert breach of contract claims against HUD for breaches allegedly committed by the Blackfeet Indian Housing Authority when it sold Plaintiffs their homes. Plaintiffs allege HUD to be vicariously liable for the Housing Authority's breaches as an instrumentality or agent of HUD.

Dismissal of Counts 4, 5 and 6 is required on two separate grounds. First, HUD is not liable for contract breaches by the Blackfeet Indian Housing Authority. The Housing Authority is a tribal agency only. It is not an instrumentality or agent of HUD. Weeks Construction, Inc. v. Oglala Sioux Hous. Auth., 797 F.2d 668, 671 (8th Cir. 1986); Tohono O' odham Nation v. Schwartz, 837 F. Supp. 1024, 1031 (D. Ariz. 1993); Dubray v. Rosebud Hous. Auth. 565 F. Supp. 462, 465-66 (D.S.D. 1983); DeRoche v. United States, 2 Cl. Ct. 809, 812 (1983). Second, this Court lacks subject matter jurisdiction over the contract claims. Plaintiffs have not limited their damage claims to the $10,000 jurisdictional limit prescribed in the Little Tucker Act. 28 U.S.C. §1346(a)(2)(2000); Rowe v. United States, 633 F.2d 799, 800-01 (9th Cir. 1980). Only the Court of Claims has jurisdiction over the contract claims. Id.

D. Counts 6 and 7 — Tort Claims

The tort claims asserted in Counts 6 and 7 are subject to summary dismissal. Plaintiffs conceded at the November 12, 2003, hearing that HUD's motion to dismiss was well-taken.

TRIBAL DEFENDANTS' MOTION TO DISMISS

The Tribal Defendants have moved to dismiss all claims on grounds of tribal sovereign immunity. Plaintiffs argue tribal immunity has been waived.

Indian tribes, tribal agencies, and tribal officials acting within the scope of their official duties enjoy sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Linneen v. Gilva River Indian Comm., 276 F.3d 489, 492 (9th Cir. 2002); Stock West Corp. v. Lujan, 982 F.2d 1389, 1398 (9th Cir. 1993). Blackfeet Housing, as a tribal agency, is entitled to sovereign immunity. Dillon v. Yankton Sioux Tribe Hous. Auth., 144 F.3d 581, 583-84 (8th Cir. 1998); Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 84 (2nd Cir. 2001); Weeks Construction, Inc., 797 F.2d at 670. Sovereign immunity, however, may be waived. United States v. Testan, 424 U.S. 392, 399 (1976). The waiver must be unequivocal. Id.

Plaintiffs contend that a waiver provision in Tribal Ordinance No. 7 operates to waive the Tribal

Defendants' immunity for the claims asserted in this case. It states:

> The Council hereby gives its irrevocable consent to allowing the [Blackfeet Indian Housing] Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be be liable for debts or obligations of the Authority.

Tribal Ordinance No. 7, art. V, ¶2 (Jan. 4, 1977).

Article V is not a waiver of the Tribal Defendants sovereign immunity for the claims asserted in this case. That provision simply gives the Tribal Defendants the authority to waive sovereign immunity, by contract, should they so choose. Ninigret Development Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 30 (1st Cir. 2000); Dillon, 144 F.3d at 583-84; Garcia, 268 F.3d at 87. No contractual waiver exists in the record.

ORDER

1. HUD's motion to dismiss the original Complaint[8] is DENIED as moot.

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[8] Docket No. 22

2. HUD's motion to dismiss the Amended Complaint[9] is GRANTED.

3. Tribal Defendants' motion to dismiss the original Complaint[10] is DENIED as moot.

4. Tribal Defendants' motion to dismiss the Amended Complaint[11] is GRANTED.

5. In view of the Court's ruling on Tribal Defendants' motion to dismiss, Tribal Defendants' motion for a protective order[12] is DENIED as moot.

6. The Clerk of Court is directed to enter judgment consistent with this Memorandum and Order.

DATED this 14th day of January, 2004.

Sam E. Haddon

SAM E. HADDON
United States District Judge

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[9] Docket No. 48
[10] Docket No. 9
[11] Docket No. 45
[12] Docket No. 15

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MARTIN MARCEAU CANDICE LAMOTT JULIE RATTLER, JOSEPH RATTLER, JR., JOHN G. EDWARDS JR., DEANA MOUNTAIN CHIEF, on behalf of themselves and others Similarly situated, Plaintiffs, vs. BLACKFEET HOUSING and its board members	)	Cause No. CV-02-73-GF-CSO Judge Haddon AMENDED CLASS ACTION COMPLAINT

SANDRA CALFBOSSRIBS)
NEVA RUNNING WOLF)
KELLY EDWARDS,)
and URSULA SPOTTED)
BEAR, & MEL)
MARTINEZ, Secretary,)
DEPARTMENT OF)
HOUSING AND URBAN)
DEVELOPMENT UNITED)
STATES OF AMERICA)
)
Defendants.)

Plaintiffs complain of the Defendants and, for their claim for relief, allege as follows:

A.

INTRODUCTORY STATEMENT

1. **Class Action.** This is a class-action complaint in which the named Plaintiffs seek to have a class or classes certified in which Martin Marceau, Candice LaMott, Julie Rattler, Joseph Rattler, Jr., John G. Edwards, Jr., Mary J. Grant, Gary Grant, and Deana Mountain Chief represent themselves and all persons similarly situated who are purchasing their homes on a lease purchase arrangement either directly or indirectly from the Defendant Blackfeet Housing formerly known as Blackfeet Housing Authority.

2. **Defective Homes.** The Defendant

BLACKFEET HOUSING either sold or leased homes to representative Plaintiffs and other Class members that were defective. Their construction involved the use of a wood foundation and other inadequate materials and faulty construction and design mandated by the Defendant MEL MARTINEZ, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA (hereinafter "HUD") which materials, construction and design are not appropriate for use in the area in which the homes were located. As a result of this defective materials, construction, and design, mold, sewage, and other toxic substances have developed and been deposited along with other defects which have made the homes inhabitable, in need of unnecessary repairs, and have caused sickness and illnesses to the Plaintiffs and other occupants as hereinafter set forth. Representative Plaintiffs and other Class members have complained numerous times and requested the problems be fixed or repaired or some other solution be reached and the Defendants have either ignored these complaints or made promises which have not been kept.

IDENTIFICATION OF THE PARTIES

3. The Plaintiffs are homeowners within the territorial boundaries of the Blackfeet Reservation and within Glacier County, Montana, who either purchased homes constructed by the Defendant BLACKFEET HOUSING under the direction and supervision of and with funding from the Defendant HUD. They are all members of the Blackfeet Tribe of Indians.

4. The Defendant BLACKFEET HOUSING is a nonprofit organization organized by and under the auspices and direction of the Defendant HUD to assist members of the Blackfeet Tribe to obtain adequate housing. It is the successor organization to BLACKFEET INDIAN HOUSING AUTHORITY that was originally organized in 1976 or 1977 for the purpose of building and holding title to the 153 houses and other homes hereinafter referred to. It, too was organized by and under the auspices and direction of the HUD. BLACKFEET HOUSING received all the assets and assumed all the liabilities of BLACKFEET INDIAN HOUSING AUTHORITY, SANDRA CALFBOSSRIBS, NEVA RUNNING WOLF, KELLY EDWARDS, and URSULA SPOTTED BEAR are the current members of the Board of Directors of the BLACKFEET HOUSING.

5. The Defendant MEL MARTINEZ, Secretary, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, UNITED STATES OF AMERICA (hereinafter "HUD") is the Secretary of a department of government of the United States government charged with providing decent, suitable, safe and sanitary housing to every American through funding and other assistance and who has special responsibilities toward Indian people as set forth in special legislation designed to assist Indian people obtain decent, suitable, safe and sanitary housing.

JURISDICTION AND VENUE

6. The jurisdiction of this court is invoked under the authority of the National Housing Act, 12 USC §1702 and 42 USC §1401a. Jurisdiction is also

invoked under 28 USC §1331, namely, a Federal Question under 42 USC §1441 (the Secretary is obliged to provide a "decent" home and "suitable" living environment for every American family) and 42 USC §1437 (the Secretary is obliged to provide decent, safe and sanitary dwellings for families of lower income) and 25 USC §4101 et seq. (Native American Housing Assistance and Self Determination Act of 1996, the Secretary is obliged to repair and maintain Indian Housing).

7. The Jurisdiction of this court is further invoked under the authority of the Tucker Act, 28 USC §1346(a)(2).

8. The supplemental jurisdiction of this court is invoked under the authority of 28 USC §1367.

9. The venue is proper in this court because the Defendant Blackfeet Housing resides within the judicial district of this court, a substantial part of the events or omissions giving rise to the claim occurred within the judicial district of this court, a substantial part of the property that is the subject of this action is situated within the judicial district of this court, and the representatives Plaintiffs all reside within the judicial district of this court (see 28 USC §1391.)

SOVEREIGN IMMUNITY

10. The sovereign immunity of the Secretary of the Department of Housing and Urban Development is expressly waived in 12 USC Section 1702 and 42

USC Section 1404a. It is also waived by the Tucker Act (28 USC §1346(a)(2).

11. The sovereign immunity of Blackfeet Housing is waived by its adoption of a resolution authorizing it to sue and be sued and because it is an arm and instrumentality of HUD thereby subjecting itself to the waiver of sovereign immunity in the previous paragraph.

FACTUAL BACKGROUND

12. The National Housing Act obliges HUD to provide a decent home and a suitable living environment for every American family. 42 USC §1441. HUD is also required to remedy the unsafe and unsanitary housing conditions and acute shortage of decent, safe and sanitary dwellings for families of lower income. 42 USC §1437. HUD is required to exercise its powers, functions and duties consistently with this National Housing Policy in such a manner as will "facilitate sustained progress in attaining the National Housing Objective" and "in such manner as will encourage and assist (1) the production of housing of sound standards of design, construction, livability, and size for adequate family life; (2) the reduction of the cost of housing without sacrifice of such sound standards;. . ." 42 USC §1441.

13. This statute is not precatory; HUD is obliged to follow these policies. *The Commonwealth of Pennsylvania v. Lynn*, 501 F.2d 848, 855 (DC Cir.) (1973). In fulfilling this mandate of Congress, HUD encouraged and directed the creation of the Blackfeet Housing Authority, predecessor of

Defendant Blackfeet Housing for the purpose of assisting persons living within the territorial boundaries of the Blackfeet Indian Reservation to obtain decent and adequate housing.

14. Under the Native American Housing Assistance & Self Determination Act of 1996, Congress has stated that:

> the Federal Government has a responsibility to promote the general welfare of the Nation . . . by using Federal resources to aid families and individuals seeking affordable homes in safe and healthy environments and, in particular, assisting responsible, deserving citizens who cannot provide fully for themselves because of temporary circumstances of factors beyond their control. . .

25 USC §4101(1). This same act explains that Congress has assumed a trust responsibility for members of Indian tribes to "improve their housing conditions." Id. At (4). Under 25 USC §4132 of this Act, Congress has directed HUD to provide "housing services" to Indian people which includes "reconstuction, or moderate or substantial rehabilitation" of affordable housing.

15. That on or about 1976 and 1977, the Blackfeet Housing Authority, under the direction and close supervision of HUD, and upon funding made available by HUD, commenced construction of 153 houses on the Blackfeet Indian Reservation.

16. Blackfeet Housing Authority eventually completed the construction of these 153 houses and built additional houses. These houses were sold to Representative Plaintiffs and other Class members, either directly or indirectly, or were leased to Representative Plaintiffs and other class Members.

17. The construction of these houses was under the close supervision, mandate, and direction of HUD. In this regard, the Blackfeet Housing Authority became the arm or instrumentality of HUD to accomplish the goals and purposes of HUD.

18. In order to save money or for the other reasons unknown to Representative Plaintiffs and Class Members, HUD directed that all 153 homes in the first phase of construction be constructed using chemically-treated wooden foundations even though such foundations were not standard in the industry at the time, were in violation of state and local building codes, are now in violation of their own regulations, and even though HUD knew, or should have known, that such construction materials could eventually produce contamination that could eventually lead to inhabitability of these 153 homes.

19. The Defendant Blackfeet Housing acknowledged the mandates and directions of HUD and submitted thereto and proceeded to construct the houses using chemically-treated wooden foundations and other defective products and designs, even though they also knew such foundations were substandard, in violation of state and local building

codes, and would eventually produce contamination that could lead to uninhabitability.

20. Because of the use of wooden foundations and because of other design and construction defects, the houses were unable to provide continuous moisture control. This failure caused widespread mold development and septic contamination.

21. The latent defects of the chemically-treated wooden foundation and other defective designs have become known to Representative Plaintiffs and other Class members recently. In particular, pathogenic mold, septic/sewage contamination, and other toxic and dangerous substances have developed. These molds, septic/sewage contamination, and other toxic substances have caused various health and medical conditions and have exacerbated other health and medical conditions in representative Plaintiffs and other class members including their spouses and children and other dependents living in their homes.

22. In addition, many of the houses contained extensive septic/sewage contamination resulting from repeated groundwater and septic flooding. Children who have been required to sleep in rooms with mold and septic/sewage contamination have developed health complications that have prevented them from playing sports and that has resulted in frequent nose bleeding, asthma, hoarseness, headaches and malaise, kidney failure, and cancer. Elderly and other class members have developed similar health complications from exposure to these contaminations.

23. Because of the pathogenic mold, septic/sewage contamination, and other toxic substances, the houses have become unsafe for human habitation, and Representative Plaintiffs and other Class members have been damaged.

24. In January of 2002 the Environmental Protection Agency of the United States Government declared such chemically treated wooden foundations unfit for use in the construction of homes and banned their use in all such construction.

25. HUD has failed to fulfill its Congressional mandate to provide decent, suitable, safe, and sanitary housing for members of the Blackfeet Indian Reservation, a recognized lower-income group, and to provide housing of sound standards of design, construction and livability.

26. The Housing Authority has sold homes to Representative Plaintiffs and other Class members that are substandard, unsafe, unsuitable, unsanitary, unhealthy and uninhabitable.

27. Representative Plaintiffs and other Class members have repeatedly, since January of 2002, asked HUD and the Housing authority to fix the problems and to provide safe, decent and suitable housing for Representative Plaintiffs and other Class members. Most of the residents have been living with these biological contaminants for between 5 and 15 years. The problem is ongoing.

28. Defendants have ignored these requests and have failed to fix or repair, reconstruct or rehab-

ilitate the homes of Representative Plaintiffs and other Class members.

29. Representative Plaintiffs and other Class members have been damaged because of these actions and these failures.

30. Representative Plaintiffs and other Class members seek adequate remedies including an order or orders requiring Defendants to comply with the federal law, to make their homes safe, suitable, decent, and sanitary. Representative Plaintiffs and other Class members seek an order or orders requiring Defendants to either rehabilitate or reconstruct their existing homes or provide them with new homes or pay them adequate damages so they may make their own repairs or acquire their own safe, decent and sanitary housing. Representative Plaintiffs see an order or orders awarding such other damages as may be appropriate and awarding attorney fees as authorized by law.

CLASS ALLEGATIONS

31. Pursuant to the rules for the certification of a class action that exists in federal jurisdictions (Fed.R.Civ. P. 23), the representative Plaintiffs bring this action as a class action consisting of:

> All homeowners and persons living in homes constructed by the Blackfeet Housing or its predecessor with financial assistance and under the direction of HUD, within the Blackfeet Indian Reservation, whose homes are

contaminated, unsafe, or unsanitary and who have not received adequate assistance from Defendants in fixing, repairing, reconstructing, rehabilitating or replacing said contaminated, unsafe, or unsanitary homes or have otherwise suffered damages because of defective design.

32. This action is properly brought as a class action because the class numbers are so numerous that joinder of all of them is impracticable. The identity of the class members and their names and addresses are uniquely within the knowledge of the Defendants.

33. This action is properly brought as a class action because certain questions of law and fact exist as to all class members, and predominant over any questions solely affecting any individual class members, inter aila:

1. Whether HUD mandated the use of chemically treated wood foundations?

2. Whether HUD improperly authorrized and approved chemically treated wooden foundations?

3. Whether HUD required designs and construction that was so defective that continuous moisture control was impossible?

4. Whether HUD required designs

and construction that resulted in septic/ sewage contamination?

5. Whether HUD breached its non-precatory mandate to provide a decent home and suitable living environment for every American family in authorizing unsafe and contaminated homes to be built and sold or leased to representative Plaintiffs and other class members?

6. Whether HUD breached its non-precatory mandate to provide decent, safe, and sanitary dwellings for families of lower income?

7. Whether HUD breached its non-precatory mandate to provide decent, safe, and sanitary dwellings for families of members of an Indian tribe.

8. Whether HUD breached its non-precatory mandate to fix, repair, reconstruct, rehabilitate, or moderate the defective and unsafe and unsanitary conditions of Representative Plaintiffs and Class members homes.

9. Whether HUD has a special obligation to these Representative Plaintiffs and other class members because of the Trust Responsibility of the Federal Government to Indians?

10. Whether HUD or the Housing

Authority breached the federal common law protection for implied warranties of fitness?

11. Whether a federal common law protection against breach of implied warranty fitness exists in this case?

12. Whether the implied warranty of fitness has been breached in this case?

13. Whether the contaminants used by the Housing Authority at the direction of HUD caused the homes to be unsafe?

14. Whether the contaminants used by the Housing Authority at the direction of HUD caused injury to representative Plaintiffs and other class members?

15. Whether the representative Plaintiffs and other class members are entitled to injunction relief or other appropriate remedies?

The only material question applicable to individual class members is the precise amount of damages caused to each Class member and the most appropriate remedy for each Class member. This information can be easily determined in a hearing regarding damages or other expeditious method of determining damages and individual remedies in class actions.

34. The Representative Plaintiffs' claims are typical of the Class members' claims since the Representative Plaintiffs and all Class members have been treated in the exact same manner by the Defendants.

35. The interest of the class members will be fairly and adequately protected by Representative Plaintiffs. The Representative Plaintiffs' interests are consistent with those of the Class members. The Representative Plaintiffs are committed to prosecuting this action and have retained counsel experienced, knowledgeable, and competent in class action litigation and in defective housing issues. Neither the Representative Plaintiffs nor their counsel have any interest that might cause them not to vigorously pursue this action.

36. The Representative Plaintiffs are not antagonistic to, or in conflict with, the interest they seek to represent. The Representative Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

37. Class certification, therefore, is appropriate under the rules of class certification recognized in Fed.R.Civ.Proc. 23(b)(1) because the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members which would result in incompatible results and obligations of the Defendants. Class certification also is appropriate because adjudication would, as a

practical matter, be dispositive of the interests of the individual Class members.

38. Class certificate is also appropriate because the above-described common questions of law and fact are predominant over any questions affecting individual Class members, thereby causing a class action to be superior to other available methods for the fair and efficient adjudication of this controversy.

39. The expense and burden of litigation would substantially impair the ability of the class members to pursue individual lawsuits in order to vindicate their rights and place an undue burden on the Court's system. In the absence of a class action, the Class members may not be able to pursue effectively their rights against the Defendants because the damages would be insufficient to justify such an action, and Defendants may not be required to make just compensation or take property action to remedy the damages they have caused.

COUNT ONE
(Violation of the United States Trust Responsibility)

40. Representative Plaintiffs reassert all the previous allegations.

41. The trust relationship existing between the United States and Indian Nations as set forth in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), "resembles that of a ward to its guardian."

42. The Supreme Court has found that a Federal agency which exerts both pervasive and comprehensive control over monies or property for the benefit of Indians has a trust or fiduciary relationship with those Indians. *United States v. Mitchell*, 463 U.S. 206, 222, 103 S.Ct. 2961 (1983).

43. *Mitchell* further holds that the beneficiaries of the trust relationship are individual Indians as well as Indian tribes. "This Court [. . . has] consistently recognized that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the Trustee for damages resulting from a breach of the Trust." *Mitchell*, 463 U.S. at 226.

44. Cannons of constructions require that statutes passed benefiting Indians are to be liberally construed and ambiguous provisions interpreted to the Indians' benefit. Because of the unique legal status of Indians, legal doctrines must be approached from a different perspective. *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548, 553 (9th Cir. 1991).

45. When the United States Housing Act of 1937 undertook to provide decent homes and suitable living environment for every American Family including Indians, the United States acted within its trust relationship with the Indian Nations and individual Indians. 42 USC §1401 et seq. The National Housing Act undertook the same mandate. 12 USC §§1702-1705.

46. The 1990 Amendment to the National Housing Act provides that the United States will attempt to "remedy the unsafe and unsanitary conditions and acute shortage of decent, safe and sanitary dwellings for families of lower income." 42 U.S.C. §1437 et seq.

47. The statutes and regulations adopted pursuant to these housing acts and amendments, were intended to benefit the Representative Plaintiffs by providing them with safe and sanitary housing. The terms under which the benefits are conferred create a binding obligation which is mandatory, not at the discretion of the Federal Agency, and one which because of its comprehensive and pervasive control of the monies, the property, the standards for constructing the homes, the standards for providing mortgages for the homes, the standards for who qualifies to live in the homes, triggers the fiduciary relationship between the United States and Representative Plaintiffs.

48. The corpus of the trust agreement is found in the statutes – to provide decent, safe and sanitary housing to the Representative Plaintiffs. The fiduciary relationship is binding on agencies of the federal government including HUD. *Dewakuku v. Cuomo*, 107 F.Supp.2d 1117, 1126 (D. Ariz. 2000), overturned on other grounds; citing *HRI, Inc. v. Environmental Protections Agency*, 198 F.3d 1224, 1245 (10 Cir. 2000), (quoting Felix S. Cohen, *Handbook of Federal Indian Law* 225 [1982]).

49. As trustee, HUD breached the fiduciary relationship when it constructed houses that were

not only sub-standard but dangerous to the Indian occupants, and therefore, HUD plainly acted adversely to the beneficiaries' interest.

50. HUD had a duty to repair the houses once it knew of the need. Under the Indian Housing Act passed in 1988 and the subsequent regulations, 24 CFR §905.270, HUD could provide additional money to the local housing authorities for repair and remediation of housing problems, and therefore, was "a necessary participant in the corrections process after home construction was completed." *Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1203-1204 (D. Ariz. 2002).

51. Indian housing is presently controlled by the Native American Housing and Self-Determination Act of 1996, Pub.L. No. 104-330 (HR 3219), codified at 25 USC §4101 et seq. The primary objective of the Act is "to assist and promote affordable housing activities to develop, maintain, and operate affordable housing in safe and healthy environments on Indian Reservations and in other Indian areas for occupancy by low-income Indian families . . . ." 25 USC §4131(a)(1). The Act also provides for "operating assistance for housing previously developed or operated pursuant to a contract between the Secretary and an Indian Housing Authority." 25 USC §4132 (1)-(5). Each housing authority is also required to maintain the housing. 25 USC §4133.

52. Under the Native American Housing Assistance and Self-Determination Act, Congress found that "there exists a unique relationship between the government of the United States and

the governments of Indian tribes and a unique Federal responsibility to Indian people." 25 USC §4101(2). Congress also states that under the Act, the "United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people." 25 USC §4101(3). This language makes clear that the trust responsibility applies to HUD's actions or inactions under its current activities on the Blackfeet Reservation. It also makes clear that the trust responsibility applies to individual Indians as well as tribes.

53. The Representative Plaintiffs have an enforceable right to sue HUD as a trustee for damages resulting from the breach of the trust. As set forth above, by its actions and inactions regarding the homes of Representative Plaintiffs and other Class members HUD has breached that trust. The Representative Plaintiffs and other class members are entitled to injunctive or declaratory relief, to damages to be determined at trial, and to attorney's fees.

COUNT TWO
(Administrative Procedures Act)

54. Plaintiffs re-assert all of the previous allegations.

55. The action of HUD set forth above is Agency action. Agency action caused harm to the Representative Plaintiffs and other class members, the action was not discretionary, it was otherwise not in accordance with law, and, therefore, is

actionable under the Administrative Procedures Act. 5 U.S.C. §701, et seq.

56. The Representative Plaintiffs and other class members have repeatedly asked Blackfeet Housing Authority and HUD to remedy the dangerous housing conditions. These requests have largely been ignored and the Defendants have refused to take action to remedy the housing problem.

57. The Plaintiffs have sought assistance through administrative remedies over fifteen (15) years by complaining to Blackfeet Housing and the agents and employees of HUD about the housing conditions. Although many promises have been made to correct the problems, these complaints have largely been ignored.

58. Repairing or remedying the damages of the sub-standard housing created by HUD under the National Housing Act and its amendments is not discretionary. *Dewakuku v. Martinez*, 226 F.Supp.2d 1199, 1205 (D. Ariz. 2002).

59. HUD has violated its own standards by constructing sub-standard housing using materials and construction techniques which do not meet HUD's own standards or standards used in the industry generally.

60. HUD has violated the housing acts and amendments by failing to provide safe, sanitary and decent housing to Representative Plaintiffs and other Class members.

61. The Representative Plaintiffs and other Class members have been harmed by this construction of sub-standard housing and failure to remedy or repair the sub-standard conditions.

62. HUD has an affirmative duty to repair the houses and maintain them under the mandate of the Native American Housing Assistance and Self-Determination Act. 25 USC §4101 et seq.

63. The Representative Plaintiffs and other Class members are entitled to declaratory and injunctive relief and to damages, or other appropriate relief from Defendants, and to attorneys' fees.

Plaintiffs and other class members have been harmed by this construction of sub-standard housing and failure to remedy or repair the sub-standard conditions.

64. Hud has an affirmative duty to repair the houses and maintain them under the mandate of the Native American Housing Assistance and Self-Determination Act. 25 USC §4101 et seq.

65. The Representative Plaintiffs and other class members are entitled to declaratory and injunctive relief, or other appropriate relief from Defendants and to attorneys=fees.

COUNT THREE
(Injunctive and Declaratory Relief for Violation of a Federal Statute)

66. Representative Plaintiffs reassert all of the previous allegations.

67. The 153 houses and other homes in question were constructed with the assistance of HUD, under the direction of HUD, and with the financing of HUD.

68. They are defective, unsuitable for a living environment, unsanitary, and unsafe for human habitation because of the use of chemically-treated wooden foundations and because of other design defects either because of the original construction or because of Defendants' failure to maintain them property.

69. The nonprecatory mandate to HUD in 42 USC §§1441 and 1437 and in 25 USC §4101 et seq. requires that HUD remedy the situation by repairing the damage, providing alternative housing, or by responding in damages so that representative Plaintiffs and other class members may obtain decent and suitable housing that is safe and sanitary.

70. Representative Plaintiffs and other class members are entitled to declaratory relief, injunctive relief, or other appropriate relief from Defendants who are capable of remedying the situation.

COUNT FOUR
(Breach of the Covenant of Habitability)

71. Representative Plaintiffs reassert all of the previous allegations.

72. The Housing Authority, by selling or leasing a defective home to Representative Plaintiffs and other Class members, has breached its implied warranty of habitability. Representative Plaintiffs and other Class members are entitled to equitable relief accordingly.

73. The contractual obligations between the parties in this matter arise out of the federal law and represent a federal question actionable under 28 USC §1331. "Suits to enforce contracts with federal agencies are governed by federal common law. . .and as a result arise under federal law for purposes of section 1331." *Jackson Square Associates v. United States Dept. of Housing and Urban Development*, 797 F.Supp. 242, 245 (W.D.N.Y. 1992). (citations omitted). The contract should be interpreted with closer attention to the obligations of the United States because those obligations arise out of the fiduciary relationship.

74. The implied warranty of habitability is founded under federal common law and under the laws of the State of Montana. Chase v. Theodore Mayer Brothers, 592 F.Supp. 90, 95 (S.D. Ohio 1983), Mathes v. Adams, 254 Mont. 347, 358 838 P.2d 390, 396 (1992).

75. Blackfeet Housing and its predecessor, Blackfeet Housing Authority, were created by and under the auspices and direction of HUD. They each became an instrumentality for the accomplishment of the goals of HUD. They remained and still remain under the total dominance and direction of HUD. As

such, they each have become an agent, an arm, and an instrumentality of HUD and, as such, are fully liable, along with HUD, for all of the actions and omissions previously alleged. Both Blackfeet Housing and HUD are liable for a breach of the implied warranty of habitability.

76. Representative Plaintiffs and other Class members are entitled to damages for breach of the implied warranty of habitability.

COUNT FIVE
(Breach of the Implied Covenant of Merchantability)

77. Representative Plaintiffs reassert all of the previous allegations.

78. Blackfeet Housing and its predecessor, Blackfeet Housing Authority breached its implied warranty of merchantability by contracting to sell and lease homes to Representative Plaintiffs and other Class members that were defective and unfit for habitation. The houses were constructed in an unsafe and unsanitary and unhealthy manner in violation of the recognized industry standards and in violation of the law and regulations applicable to such housing.

79. Representative Plaintiffs and other Class members are entitled to a remedy. They are entitled to have their homes fixed, repaired, made decent, suitable and safe. In the alternative, they are entitled to alternative, adequate, and satisfactory homes. In the alternative, they are entitled to

damages in an amount that will compensate them for the damages they have suffered because of the wrongful acts and omissions of the Defendants.

80. The Blackfeet Housing and its predecessor were created by and under the auspices and direction of HUD. They each became an instrumentality for the accomplishment of the goals of HUD. They remained and still remain under the total dominance and direction of HUD. As such, they become an agent and instrumentality of HUD and both HUD and Blackfeet Housing are fully liable for all of the actions and omissions alleged in this Count for breach of the implied warranty of merchantability. Representative Plaintiffs and other Class members are entitled to equitable relief, or in the alternative, money damages for this breach.

COUNT SIX
(Breach of the Covenant of Good Faith and Fair Dealing)

81. Representative Plaintiffs reassert all of the previous allegations.

82. Representative Plaintiffs and other Class members are entitled to rely on the good faith and fair dealing of Blackfeet Housing and HUD in pursuing their contractual relationships. Representative Plaintiffs and other Class members who are homeowners purchased these homes under a contract. Representative Plaintiffs and other Class members who are tenants entered into a lease agreement with Blackfeet Housing, which, along

with applicable landlord and tenant law, governs the relationship of the parties. Each of the Representative Plaintiffs and other Class members had a justified expectation that Blackfeet Housing and HUD would act in a reasonable manner in the performance of these agreement or conduct an efficient breach.

83. The parties are inherently unequal in their bargaining positions in that Blackfeet Housing and HUD, with access to large amounts of funds, clearly had a superior position to each of the Representative Plaintiffs and other Class members who are lower-income Americans and Indians. Housing for Representative Plaintiffs and other Class members was only available by complying with the wishes and desires of Blackfeet Housing and HUD. There was no other alternative for them to obtain housing.

84. The motivation for entering the contract was a nonprofit motivation.

85. Ordinary contract damages are not adequate because they would not require the parties in a superior position to account for their actions, and they do not make the inferior party whole.

86. Representative Plaintiffs and other Class members are especially vulnerable because of the type of harm that has been suffered. They, by necessity, placed trust in Blackfeet Housing and HUD to provide decent and suitable housing that would be safe and healthy and to repair their homes or replace them if necessary.

87. Blackfeet Housing was aware of this vulnerability. Nevertheless, Blackfeet Housing and HUD acted dishonestly and outside the reasonable commercial standards of fair dealing in the trade by failing to produce decent, suitable, safe, and healthy housing, by representing that such housing was decent, suitable, safe and healthy when it was not, by failing to maintain the properties as required, and by failing to remedy the situation when the defects were revealed to them.

88. The Representative Plaintiffs and other Class members have been damaged and are entitled to recover for a breach of the covenant of good faith and fair dealing sounding in tort and contract. HUD is liable because Blackfeet Housing was its agent or instrumentality in fulfilling the mandate of Congress.

89. Defendants have been guilty of malice, implied malice, and reckless indifference in failing to provide decent, safe, and sanitary housing to Representative Plaintiffs and Class members and Representative Plaintiffs and Class members are entitled to punitive damages accordingly.

COUNT SEVEN
(Emotional Stress)

90. Because of the violations of the laws and regulations designed to protect Representative Plaintiffs and other Class members, because of the breaches of the implied warranties of habitability and merchantability, because of the understanding that they were being furnished a decent, suitable,

safe and healthy home when they were not, because of the representation that they were being furnished a decent, suitable, safe and healthy home which was not true, and because of the failure of the Defendants to remedy the situation when they learned that the homes were not decent, suitable, safe and healthy, representative Plaintiffs and other class members have suffered emotional stress.

91. Representative Plaintiffs and other class members are entitled to recover the damages resulting from said emotional stress.

WHEREFORE, Representative Plaintiffs pray for relief as follows:

1. That this case be accepted as a Class Action under Rule 23 of the Fed. R. Civ. Proc. that it be certified as a Class Action, and that Plaintiffs be designated the Representative Plaintiffs with authority to pursue the claims of all class members.

2. That Representative Plaintiffs and other Class members are entitled to relief against all Defendants for breach of the federal government's trust responsibility towards Indians and Representative Plaintiffs and other Class members as set forth in the mandates of Congress in the various Housing Acts.

3. That Representative Plaintiffs and other class members are entitled to injunctive and/or declaratory relief against all Defendants, requiring Defendants to comply with the federal laws and regulations, to immediately take whatever action is necessary to provide decent, safe and sanitary homes, and, if needed, to conduct whatever study or fact finding is necessary to insure the health of the Representative Plaintiffs and other class members and their families is not further jeopardized.

4. That Representative Plaintiffs and other Class members are entitled to relief and damages for the breach of the implied warranty of habitability against all Defendants.

5. That Representative Plaintiffs and other class members are entitled to relief and damages for the breach of the implied warranty of merchantability against all Defendants.

6. That Representative Plaintiffs and other class members are entitled to relief and damages for the breach of the covenant of good faith and fair dealing against all Defendants and for punitive damages against all Defendants.

7. That Representative Plaintiffs and other class members are entitled to damages for emotional stress against all Defendants.

RESPECTFULLY SUBMITTED this 3rd day of April, 2003.

ATTORNEYS IN CHARGE FOR THE REPRESENTATIVE PLAINTIFFS AND PUTATIVE CLASS:

TOWE, BALL, ENRIGHT, MACKEY & SOMMERFELD, P.L.L.P.

By /s/ THOMAS E. TOWE

and

SIMKOVIC LAW FIRM, P.L.L.C.

By /s/ JEFFREY A. SIMKOVIC

DEMAND FOR JURY TRIAL

Representative Plaintiffs demand a trial by jury on all issues for which they are entitled to a trial by jury.

No. 08-881

In the Supreme Court of the United States

MARTIN MARCEAU, ET AL., PETITIONERS

v.

BLACKFEET HOUSING AUTHORITY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal agency's pervasive control over Indian housing construction creates common-law trust duties that the agency owes to individual Indians.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-45, 46-91, 92-121) are reported at 540 F.3d 916, 519 F.3d 838, and 455 F.3d 974. The order of the district court (Pet. App. 122-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2008. Petitions for rehearing were denied on August 22, 2008, and an amended opinion was issued on that date (Pet. App. 5). The petition for a writ of certiorari was filed on November 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1970s, the Department of Housing and Urban Development provided funding under the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*, to the Blackfeet Housing Authority (Authority), which utilized the funding to construct houses on the Blackfeet Indian Reservation between 1977 to 1980. The Authority built those houses, including houses now owned by petitioners, with wood foundations constructed with pressure-treated lumber. Petitioners are American Indian homeowners who allege that their houses are defective and hazardous because they were built with foundations containing toxic chemicals. Petitioners brought this action in 2002 seeking money damages and declaratory and injunctive relief against the Department of Housing and Urban Development and its Secretary (collectively, HUD) and the Authority and its board members (collectively, Authority). Pet. App. 7-8.

As is relevant here, petitioners asserted a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, seeking a declaratory judgment that HUD improperly authorized substandard housing, in violation of its own regulations, and injunctive relief mandating either the repair or the replacement of their houses. Pet. App. 23, 156-158. Petitioners also sought money damages for HUD's purported breach of Indian trust duties allegedly owed to petitioners by the government. *Id.* at 152-156.

The district court granted HUD's and the Authority's motions to dismiss. Pet. App. 122-136. Among other things, the court dismissed petitioners' APA claim because petitioners failed to show that HUD's actions were contrary to law, *id.* 132-133, and dismissed petitioners' Indian trust claim because none of the statutes or

regulations that petitioners invoked imposed relevant duties on HUD that might give rise to a cause of action under what the court styled the "*Mitchell* Doctrine," *id.* at 124-132; *id.* at 126 (illustrating asserted doctrine with citations to *United States* v. *Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*), *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*White Mountain*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)).

2. a. The court of appeals affirmed the dismissal of petitioners' claims against HUD but reinstated petitioner's claims against the Authority. Pet. App. 92-121. As is relevant here, the court concluded that petitioners' APA claim was barred by 5 U.S.C. 702 because it sought relief that was tantamount to money damages, Pet. App. 113-115, and that petitioners failed to show that "a grant of HUD funds" to the Authority gave rise to enforceable trust duties that might support their Indian trust claim, *id.* at 110-113.

b. The panel subsequently granted the Authority's rehearing petition and issued an opinion revisiting all of the issues raised on appeal. That opinion on rehearing (Pet. App. 46-91) adhered to the panel's prior holdings with one exception, reversing course on petitioners' APA claim and remanding that claim for further proceedings. *Id.* at 68-71. Judge Pregerson, who had authored the panel's original decision, dissented from the court's renewed holding that petitioners failed to state an Indian trust claim against HUD. *Id.* at 71-91.

c. Both HUD and the Authority petitioned for rehearing, which the court of appeals denied. Pet. App. 5. However, in denying rehearing, the court replaced its original opinion on rehearing "in its entirety" (*ibid.*) with an amended opinion. *Id.* at 6-45. That opinion

modified the panel's rationale for reinstating petitioners' APA claim, *id.* at 22-25, and again upheld the dismissal of petitioners' Indian trust claim, *id.* at 10-22. The court concluded that the governing "statutes and regulations pertaining to the Blackfeet houses at issue" showed that HUD did not have an obligation to construct, maintain, or repair the houses at issue and that, therefore, it did not breach a trust duty that could give rise to an Indian trust claim. *Id.* at 15, 22. The court noted that, "[a]s with any grant of federal funds," the Authority had to satisfy "certain requirements * * * to obtain and spend [HUD] funds." *Id.* at 22. But, it explained, the "federal government held no property—land, houses, money, or anything else—in trust," it "did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms," and it "did not build, manage, or maintain any of the housing." *Ibid.*

Judge Pregerson again dissented regarding the Indian trust claim, Pet. App. 25-45, concluding that HUD funding gave HUD "pervasive control over [the Authority's] housing program." *Id.* at 44. He reasoned that "[t]he federal government undertook, as part of its treaty and general trust relationship, to assist the Blackfeet tribe to acquire decent, safe, and sanitary housing for low-income families," and that "[t]he tribe had little choice but to accept the government housing program." *Ibid.* In his view, "the government undertook to fulfill its trust responsibility to provide housing for the tribe and did so through a pervasive regulatory structure" and, for that reason, "the federal government * * * had an obligation to perform [the task] in a manner consistent with its fiduciary duty to the tribe." *Id.* at 44-45. Based on the allegations in petitioners' complaint, he concluded that HUD failed to do so. *Ibid.*

ARGUMENT

Petitioners contend (Pet. 8-43) that what they assert was the federal government's pervasive control over the construction of their homes by the Blackfeet Housing Authority imposed common-law trust duties on the government that HUD breached in this case. The court of appeals correctly affirmed the dismissal of that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners' trust claim is premised on this Court's jurisprudence under the Indian Tucker Act, 28 U.S.C. 1505, and rests primarily on *Mitchell II*, *White Mountain*, and the Federal Circuit's (now reversed) opinion in *Navajo Nation* v. *United States*, 501 F.3d 1327 (2007). See Pet. i, 9-10. Petitioners argue (at 12, 14) that, while "the statutes in the instant case only establish a mechanism for lending [federal] money to tribal housing authorities," the federal government exercised de facto "pervasive control and supervision" over the Authority's construction of their homes and that HUD's "'pervasive' role * * * defines the contours of the United States' [non-statutory, non-regulatory] fiduciary responsibilities" to petitioners. According to petitioners, "federal control or supervision is the key," and an agency's exercise of de facto control gives rise to trust duties even where the pertinent statutory or regulatory provisions do not. Pet. 15, 21. Petitioners thus contend that the court of appeals' rejection of their trust-based contentions conflicts with *Mitchell II*, *White Mountain*, and the Federal Circuit's decision in *Navajo Nation* (Pet. 8-21); and is contrary to petitioners' allegations and the government's purported history of exercising plenary control over Indian housing matters, Pet.

22-43. Those contentions are without merit and are now foreclosed by this Court's recent decision in *United States* v. *Navajo Nation*, No. 07-1410 (Apr. 6, 2009) (*Navajo II*).

a. As an initial matter, petitioners' trust claim suffers from a fatal jurisdictional defect. The doctrinal foundation for that claim rests on the limited waiver of sovereign immunity in the Indian Tucker Act, which authorizes Indian Tribes to sue the United States for money damages based on certain claims founded upon violations of federal statutes or regulations. See *Navajo II*, slip op. 2-3, 13-14 (discussing *Mitchell II* and *White Mountain*); see also *White Mountain*, 537 U.S. at 472-473; *Mitchell II*, 463 U.S. at 211-212, 214-218. Petitioners, who are individual Indians and not Tribes, presumably assert their claim under the Tucker Act, 28 U.S.C. 1491(a)(1), which provides a similar waiver for claims of non-tribal plaintiffs. See *Navajo II*, slip op. 2; *United States* v. *Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*) (acts provide "same access" to relief). But both the Tucker and Indian Tucker Acts vest the Court of Federal Claims—not federal district courts—with jurisdiction, 28 U.S.C. 1491(a)(1), 1505, and, as the court of appeals recognized, the trust claim pressed by petitioners would be enforceable only through those jurisdictional acts. Pet. App. 11 n.3; cf. *id.* at 115 n.6 ("federal question jurisdiction cannot serve as an alternative basis for jurisdiction" in district court).* Thus, even if the court of appeals were incorrect in holding that petitioners failed to identify a duty actionable under the Tucker

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* Petitioners cannot rely upon the Little Tucker Act, 28 U.S.C. 1346(a)(2), as a basis for district court jurisdiction because they seek more than $10,000 in damages. See Pet. App. 115.

Acts, *id.* at 10-22, petitioners' claim would fail for want of statutory jurisdiction.

b. On the merits, petitioners' underlying contention that "pervasive control and supervision" gives rise to enforceable trust duties was squarely rejected by this Court in *Navajo II*. *Navajo II* explains that a plaintiff asserting an Indian trust claim must cross two distinct hurdles. *Navajo II*, slip op. 2-3. First, the plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Ibid.* (quoting *Navajo I*, 537 U.S. at 506). The plaintiff must therefore make a threshold showing that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions" in order to state a cognizable trust claim, and "neither the Government's 'control' * * * nor common-law trust principles matter" when identifying those duties. *Id.* at 13-14 (quoting *Navajo I*, 537 U.S. at 506); see *id.* at 3 (citing *White Mountain*, 537 U.S. at 477).

After a plaintiff establishes that the government has violated a duty imposed by a specific statutory or regulatory provision, the plaintiff must further show that that substantive provision mandates a damages remedy for the breach. *Navajo II*, slip op. 3, 14 (citing *Navajo I*, 537 U.S. at 506). At that second stage of the analysis, "trust principles (including any such principles premised on 'control')" can "play a role in 'inferring that [a statutory or regulatory] trust obligation [is] enforceable by damages.'" *Id.* at 14 (quoting *White Mountain*, 537 U.S. at 477) (second brackets in original). But such common-law trust principles based on "control" will become relevant only *after* the government's duties have

been defined by specific statutory or regulatory provisions. *Ibid.*

For that reason, *Navajo II* squarely rejected the Federal Circuit's conclusion in *Navajo Nation* that "the Government's 'comprehensive control' over [resources] on Indian land gives rise to fiduciary duties based on common-law trust principles." *Navajo II*, slip op. 13. That holding forecloses petitioners' arguments here. Indeed, *Navajo II* demonstrates that neither *Mitchell II* nor *White Mountain* supports the view that de facto comprehensive control by the government will give rise to trust duties untethered to specific obligations specified in statute or regulation. See *id.* at 6 (statute and regulations created the relevant duty in *Mitchell II*); *id.* at 3, 14 (*White Mountain* invoked "principles of trust law" to determine whether a statutory provision was money mandating); see also *White Mountain*, 537 U.S. at 480 (Ginsburg, J., concurring) ("dispositive question" in *White Mountain* was whether statute was money mandating; it was not the "threshold question" whether the statute "impose[d] any concrete substantive obligations"). *Navajo II* also reverses the sole Federal Circuit decision (*Navajo Nation*, 501 F.3d 1327) upon which petitioners base their claim of a circuit conflict. See Pet. 10-12; *Navajo II*, slip op. 7, 14. And *Navajo II* makes clear that petitioners' allegations regarding a history of government control over Indian housing are irrelevant when identifying the government duties whose alleged breach forms the basis for an Indian trust claim. *Id.* at 14 ("neither the Government's control over [tribal resources] nor common-law trust principles matter").

2. Even if petitioners' contentions were otherwise meritorious, certiorari review in the interlocutory posture of this case would be unwarranted. While the court

of appeals affirmed the dismissal of petitioners' trust claim, it reversed the dismissal of their APA claim, which seeks "an injunction ordering HUD to repair (or, where necessary, rebuild) their homes," and remanded that claim "for further factual development." Pet. App. 23; see *id.* at 22-25. That alternative claim for relief thus has not been resolved. The absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial of [certiorari]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see *VMI* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (stating that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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